From the Law Offices of
JOHN N. MOHR
Hall Bldg., Hood River, Ore.

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 90

DECISIONS BETWEEN OCTOBER 15, 1918, AND FEBRUARY 4, 1919

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OF THE

SUPREME COURT.

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GEORGE H. BURNETT.....Associate Justice
HENRY L. BENSON.....Associate Justice
LAWRENCE T. HARRIS.....Associate Justice
CHARLES A. JOHNS.....Associate Justice
FRANK A. MOORE*.....Associate Justice
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* Died September 25, 1918.
† Appointed September 27, 1918.
‡ Succeeded Conrad P. Olson, January 7, 1919.

DEPARTMENT NO. 1.

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JUSTICE GEORGE H. BURNETT.
JUSTICE LAWRENCE T. HARRIS.

DEPARTMENT NO. 2.

JUSTICE HENRY J. BEAN, Presiding Judge.
JUSTICE CONRAD P. OLSON.*
JUSTICE ALFRED S. BENNETT.†
JUSTICE CHARLES A. JOHNS.

THOMAS A. MCBRIDE, Chief Justice.

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By order of the Chief Justice, a case may be heard by the court sitting *in banc*, either before or after argument. In any case heard before a department, three justices must concur to render a valid judgment.

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* From September 27, 1918, to January 7, 1919.
† From January 7, 1919.

JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

February 4, 1919.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah:
- JOHN P. KAVANAUGH, Department No. 1, Portland.
- ROBERT G. MORROW, Department No. 2, Portland.
- ROBERT TUCKER, Department No. 3, Portland.
- GEORGE W. STAPLETON, Department No. 4, Portland.
- WILLIAM N. GATENS, Department No. 5, Portland.
- CALVIN U. GANTENBEIN, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—
Union, Wallowa } JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—
Gilliam, Sherman, Wheeler } DAVID R. PARKER, Condon.

Twelfth Judicial District—
Polk, Yamhill } HARRY H. BELT, Dallas.

Thirteenth Judicial District—
Klamath ..... DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—
Lake ..... L. F. CONN, Lakeview.

Eighteenth Judicial District—
Crook, Deschutes, Jefferson } T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—
Tillamook, Washington } GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—
Clatsop, Columbia } JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

February 4, 1919.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Barratt, Jasper J.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	Moore, Arthur J.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil.	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Trill, Wallace G.	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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In Memoriam.

HONORABLE FRANCIS ASBURY MOORE, LATELY A JUSTICE OF THIS COURT.

On the 3d day of December, 1918, came a committee of the Oregon and Multnomah Bar Association, and on behalf of the Bar of the State of Oregon presented to the Supreme Court of the State of Oregon the following report and resolutions:

Francis Asbury Moore was born at Ellsworth, Maine, November 5, 1844. He was educated in the public schools of Ellsworth and the Normal Institute at Iowa Falls, Iowa. From 1872 to 1876 he was Superintendent of Schools of Hardin County, Iowa. In 1874 he was admitted to the Bar of Iowa and in 1877 he removed to St. Helens, Oregon, where he began the practice of his profession. In 1882 he was elected County Judge of Columbia County, serving in this office until 1886. In 1888 he was elected to the state Senate from a district comprising Tillamook, Washington and Columbia Counties. On the expiration of his term as state senator in 1892, he was nominated and elected Justice of the Supreme Court of Oregon. He was re-elected in 1898, 1904, 1910 and 1916, serving as Chief Justice the last two years of each of these terms. He was a Republican and was an active, zealous member of the Masonic fraternity. He attained the thirty-third degree in the Ancient and Accepted Scottish Rite; he was Grand Master for the State of Oregon from 1892 to 1893, and was Grand Commander of the

Knights Templar from 1900 to 1901. He was a member of the Oregon Society Sons of the American Revolution. He was eligible to membership in this society by descent from his great-grandfather, Levi Higgins, who was a Second Lieutenant in Ezra Young's Company of the Sixth Lincoln County Regiment of Massachusetts Militia in the revolutionary war.

On the 15th of April, 1866, Judge Moore married Miss Emma Shintaffer of Mt. Pleasant, Iowa, with whom he lived in ideal family life for more than fifty years. Two daughters and two sons were born to Judge and Mrs. Moore: Mrs. Frank M. Miles, of Portland, Miss Calista Moore, and Mr. Arthur H. Moore, of Salem, who survive their father, and Mr. Frank J. Moore, who died several years ago. Judge Moore is also survived by two brothers and a sister: Dr. A. W. Moore, Dr. J. S. Moore and Mrs. Delia Leland, all of Portland.

Judge Moore was blessed with a rugged constitution. Otherwise he could not have stood the enormous volume of work which he performed while serving as a Justice of the Supreme Court. In the year 1917 his health began to fail and in 1918 his trouble was diagnosed as cardiac asthma. He continued at his desk, transacting with his usual fidelity the arduous duties of his high office long after the time when nature had warned him to cease his labors. A few weeks after the Pendleton term of court in May, 1918, he went to Newport on the advice of his physician. He did not make the progress he desired and shortly returned to Salem. On the morning of September 25th, while passing from one room to another, he collapsed and at once expired. These are the bare outlines of a life singularly rich and fruitful, a life well rounded and creditable from whatever angle it be surveyed.

Judge Moore was one of the most agreeable and companionable of men. He told a story well and enjoyed the fellowship of other men. He did not permit the arduous labors of his judicial career to impair the genial instincts with which nature had endowed him. He made friends readily and was staunch and dependable in his loyalty to those whom he esteemed. He was catholic in his sympathies and his friends were found in many communities and in all walks of life.

Judge Moore was a gentleman; he was unfailing in the tact and courtesy which are the marks of a gentleman. He was thoughtful of the feelings of others and delighted in the little acts of kindness which do so much to make life agreeable. He had a keen interest in the welfare of all young men, and in his departure they have lost a real friend. He was always mindful of the trials and difficulties of young lawyers; he delighted to help them by good advice. He was fond of good books and by indulgence in this taste became a man of ripe culture, familiar with the intellectual treasures of the past. His vocabulary was a large one and he had it at his command as a musician controls the keys of his instrument.

He was a citizen of high ideals. Until his election to the bench he was active and outspoken in public affairs. He was zealous in his support of measures which he approved and of men in whom he had confidence. His judicial work removed him from active participation in politics, but it did not abate his zeal for the community welfare or cool the ardor of his patriotism. He yielded to no American in his devotion to the good cause for which his country was fighting at the time of his death.

Judge Moore was a man of high character, upright life and strong religious principles. He was an elder

in the Presbyterian Church of Salem and active for many years in its work.

Judge Moore's fame will rest chiefly on his judicial work. For more than twenty-six years he was a Justice of the court of last resort of his adopted state, a longer period of service than has fallen to the lot of any other citizen. His opinions run through sixty-six volumes of the Oregon Reports and many opinions are not yet officially reported. This record abundantly attests the untiring industry of our departed brother and the large impress he has left on the judicial history of the commonwealth. He was careful and painstaking in his investigation of his cases, loyal to the law and accurate in his application of the law to concrete facts. He had an innate love of justice and a hatred of fraud and oppression. He performed his judicial work without fear or favor; he was blind to all considerations except those suggested by the record. He was profoundly learned in the law and had an accurate familiarity with the Oregon Reports. His opinions are couched in clear, well-chosen language; they have settled wisely many questions of law which were open to dispute, and have done much to stabilize and secure in this jurisdiction personal and property rights. Through the faithful, conscientious and painstaking performance of his judicial duties, Judge Moore grew in intellectual strength. Many of his opinions have become leading cases and have been annotated in reports of selected cases and discussed in the literature of the profession.

As a gentleman, a citizen, a friend, a husband, a father, a lawyer and a judge, his ideals were superlatively high and his life squared with his ideals.

THEREFORE BE IT RESOLVED: That in the death of Francis Asbury Moore the Bar of Oregon has lost a member distinguished for his devotion to the best ideals of the profession and endeared to other lawyers by many acts of courtesy and kindliness.

The State of Oregon has lost a patriotic citizen and a public servant of surpassing usefulness, whose example is an inspiration to all.

The court has lost a just, high-minded, profoundly learned, conscientious and courageous jurist.

BE IT FURTHER RESOLVED: That the court be requested to spread these resolutions upon its records, to print them in the next Oregon Reports to be published, and that a copy be sent to the bereaved family.

WALLACE MCCAMANT.
MARTIN L. PIPES.
JAMES H. RALEY.
A. E. REAMES.
GEO. G. BINGHAM.

Judge WALLACE MCCAMANT:

I met Judge Moore in 1891, a few months after I came to Oregon. The acquaintance ripened into a friendship which has been one of the high privileges of my life. In 1893, a few months after he became a member of this court, I presented an appeal; after the adjournment of the court he complimented me on my argument. That was more than twenty-five years ago, and in all that time I never knew him to miss an opportunity to say a kindly or a helpful word. He had a deep interest in the welfare of young men; his wise counsel, gathered from a ripe experience, was given them freely and tactfully.

Judge Moore was a man of conscience and of character. His religious principles were a vital part of his life and thought; his conduct squared with them in all the relations of life. While scrupulously upright in act, word and thought, Judge Moore was not austere or censorious. He was little inclined to judge his fellow-men, and his judgments, when rendered, were broad-gauge and charitable. He enjoyed the companionship of his fellowmen. He made friends readily and his friendship was a gift from the gods, a gift that remained with its possessor to the end.

Judge Moore was a cultured gentleman. He had read discriminatingly and he remembered clearly. He was familiar with the literature of his mother tongue.

He was the most industrious man I have ever known. I have seen him at his desk at 7:30 in the morning and in the earlier years of his judicial career he was on duty as late as 10 at night. This industry was due to his high ideals as a judge. He felt the responsibility of his office and was untiring in his effort to do justice to every litigant who appeared before him. No judge was ever more blind than he to consideration apart from the record. He avoided the very appearance of evil. I have known him repeatedly to decline to sit in a case where there was even a remote chance that his motives might be impugned.

What shall we say of his usefulness? I am one of those who believe that the just, courageous judge is a public benefactor whose worth is beyond computation. The stability of society is chiefly dependent on courts where justice is dispensed without fear or favor. The great enterprises in transportation, in-

dustry and commerce are made possible by systems of credit based on the certainty of the law. The law is not certain unless judges do their duty.

For more than twenty-six years our departed brother sat in this court of last resort, a careful lister, a patient investigator of authorities and of records. He gave the best that was in him to the public service. He shirked no duty, he side-stepped no responsibility. Through all the changes of public sentiment he remained loyal to the law. He wrote hundreds of opinions and each of them represented his view of the law as applied to a record which he had thoroughly investigated and maturely considered. He was brave, intelligent, sensible, discriminating and accurate. His opinions are couched in carefully chosen language; they all evidence research, careful reasoning and a love of right and justice. They assure that he will be remembered and respected so long as justice shall be judicially administered in the commonwealth.

Judge Moore wrote so many good opinions that it is impossible to do justice to them in an address on this occasion. His first reported opinion, found in 23 Oregon, is worthy of mention. It was rendered in the case of *Liggett* v. *Ladd;* it upheld a deed from Corvallis College to the State of Oregon. The decision made possible the founding and development of Oregon Agricultural College.

The unconscious influence of the life we are here to commemorate is beyond all price. Its kindliness has made for the happiness of others; its rectitude has made for their right living and high thinking. All men were the better for contact with this attractive, well-poised, earnest personality.

Hon. JOSEPH SIMON:

May it please the court: For the purpose of testifying to the deep sorrow felt by the Bench and Bar of Multnomah County, at the sad death of Frank A. Moore, late an associate Justice of this court, I have been directed by the committee appointed by the Multnomah County Bar Association to appear before your Honors and on behalf of that association to indicate its approval and concurrence in the resolutions which have just been read.

Having had a long personal acquaintance with Judge Moore and the advantage of observing his professional and judicial career, I trust that I may be permitted to detain the court a moment to offer a word of tribute and commendation, and to add my humble expression of how I esteemed and honored him, and my profound sense of the loss the Bench and Bar of this state have sustained by reason of his death.

My acquaintance with Judge Moore commenced shortly after his arrival in Oregon. Before his elevation to the Supreme Bench, he resided in Columbia County—the county adjoining the one in which I reside.

Judge Moore served four years as County Judge of Columbia County, and I had occasion to meet him while serving in that capacity. He also served during two sessions of the Oregon state Senate, over which I had the honor to preside. I there learned to know and appreciate his character and worth. Our official duties brought us into very close and intimate relations, and thus our acquaintance and association ripened into a warm friendship which was only interrupted by his death.

As stated in the resolution presented to the court, Judge Moore was elected to the Supreme Court in 1892, and for more than 26 years he held that high and responsible position. Had he lived to complete the term for which he was last elected, he would have occupied a seat on the Supreme Bench for 30 years. He did serve longer than any other Judge had ever served in this state.

Judge Moore's opinions crowd the pages of 66 volumes of the Reports of the Oregon Supreme Court, and in his long judicial career he has indelibly impressed upon the jurisprudence of the state, his own wisdom and ability, and the purity and uprightness of his character.

His natural endowments and intellectual discipline and attainments peculiarly fitted him for judicial life. He was thorough and diligent in his investigations. No prejudice or pride of opinion clouded his mind, perverted his judgment or prevented his reception of the truth. His learning and ability were quickened in their exercise by a strong sense of justice and an ardent love for the equity of the law. He sought only for the truth in the conscientious discharge of his official duties.

In his judgment of others, Judge Moore was charitable and kind; in his conduct, honorable and upright; in his sympathies, generous and broad; in his feelings, unselfish and sincere; and in his friendships, true and faithful. His warm social impulses and unvarying courtesy endeared him to everyone who knew him. In his home life, Judge Moore was a most affectionate and devoted husband, and a most considerate, kind and indulgent father.

In his death our state has lost an able Judge, and a useful, upright and patriotic citizen.

Judge JOHN P. KAVANAUGH:

It is a rare privilege to pay a last tender tribute of respect and affection to our departed friend. I speak as one who sat at his feet as a boy, and whose respect for him increased with each passing year. He conducted the examination when I was admitted to practice. He was here every time that I appeared in this court before to-day. He is associated with my every memory and tradition of this tribunal. Eminent associates had come and gone, but he remained as the survivor of the elder day. He always felt a profound interest in those who came to the Bar during his service. It was his delight to observe their progress, and to draw them apart and speak to them words of encouragement and good counsel. He urged the young men to be honest, sober, industrious, frugal, and he assured them that with these qualities no human power could prevent eventual success. These counsels were imparted with kindly personal interest, and with almost paternal affection. We felt the glow of his kindly heart and the grasp of his honest hand. His passing falls upon us like a personal affliction. Early impressions are the most enduring. The fleeting years cannot efface them.

> Time but the impression deeper makes,
> As streams their channels deeper wear.

We shall miss him, and though others may forget him, his life and his service are enshrined in our memories. He walked with us in the glow of health; he now abides with us in the communion of the spirit. He is still the associate of our solitudes, the companion of our dreams.

Judge Moore was a gentleman of the old school, a gentleman of heart and hand—a type too rarely met

in this our busy day. He had an open, generous nature that revealed at once his true character and disposition. He had unfailing courtesy, true gentility, human interest, and a sympathy as broad as humanity. We shall never know how many left his presence comforted and encouraged, resolved anew to continue the struggle under adverse conditions to final victory. A man of good counsel is a guide to erring feet, an inspiration in times of darkness and of doubt. His interest in legal education, of which he was a patron, and his constant and firm adherence to the ethics of his profession have made for the improvement and enlightenment of the Bench and Bar of Oregon.

He lived a life of patient and persistent toil. His industry was untiring. He devoted evening hours and vacations to judicial work. He accomplished much by unremitting labor. Remote from social conflicts, detached from political strife, he diligently wrote the record of his service. His life is now a memory, but this record will live and last as long as our institutions will endure. In the annals of Oregon there is no finer example of continued and sustained purpose. In our judicial history there is no finer example of conscientious public service. We knew him best in his official and social relations. A great light has been extinguished, and we are still in the shadow.

He feared God and he loved the brotherhood of his kind. In the final estimate of a human life, the important thing is not what one has gained, but what he has given; not what he has acquired, but what he has bestowed; not the pain he has caused, but the pain he has assuaged; not the wounds he has inflicted,

but the wounds he has healed; not the great ones he has brought low, but the weak ones he has raised up; not the applause he has received, but the works of mercy he has done. Judged by these standards the world is better that Frank A. Moore has lived his life.

He fought the good fight, he kept the faith, he has finished his course, and he leaves a memory jeweled with kindly, thoughtful service to his fellowmen. In the bloom of virile manhood he devoted his life to justice, human justice, the effluence of the divine. He held her balance with an unfaltering hand; he worshipped at her shrine, and grew old in her sanctuary. His spirit has flown to the realm of lights, to the throne of the Eternal Justice. And who will doubt that he has received the reward of faithful service. Let us who abide awhile profit by his example, and draw inspiration from his life.

Hon. W. D. FENTON:

I desire to add my testimony in behalf of the memory of the departed Judge Moore.

I first became acquainted with him when he was a resident of Columbia County. I had the impression that he taught school in that county shortly after he came to Oregon. He became quite well known in that section as a painstaking, careful and conscientious instructor of the young.

I came into a *quasi* official relation with him when he was a member of the state Senate. I was clerk of his committee—I think it was on assessment and taxation. We had before us, or before the Senate, at that time the discussion of a possible repeal of the mortgage tax law, an effort somewhat fruitless on the

part of our people to tax money in the form of mortgage taxation.

I also had the honor to be before him as a member of this court in many difficult and trying cases. I had the training of a man intrusted with the responsibility of advising, and conducting the cases of, one of our large corporations engaged in the public service. I distinctly recall one opinion rendered by him as a member of this court, involving the duty and obligation of a common carrier to provide a station, agent and station facilities for the transaction of public business. I think it was on the line of the Corvallis and Eastern Railroad east of Albany. I do not now recall the title of the cause, but I do know that his opinion is a landmark in the law of obligation of common carriers to serve the public and that it has been annotated in several sets of the annotated reports of the country.

I do not know that I could add anything more to the estimate of his character, his ability, his faithfulness and his devotion to the public service than has already been stated. His memory and his work will be chiefly cherished and honored in the judicial opinions rendered by him while a member of this court.

I know somewhat the method of his work. He took upon himself the exact performance of the duties of his office and with him it was the serious work of his life; early and late, without recreation, without amusement, enjoying only those solemn and substantial things which make of a man a machine, as it were. And yet he had enough of that lightness and levity by character to endear him to his friends and associates and all who came into contact with him.

Now, what of his memory? Shall we forget? As long as there are courts, as long as the law is admin-

istered here in this court, in this jurisdiction, his name will be honored and remembered. I remember to have picked up in desultory reading from an anonymous author, these lines:

"The living are the only dead.
The dead live, never more to die;
And often when we mourn them fled,
They never were so nigh."

And so with this man, this Judge, this brother, this father, this citizen, he and his memory will always be with us.

Hon. EARL C. BRONAUGH:

May it please your Honors: I crave indulgence to pay my personal tribute to the memory of this good man. I shall not speak with reference to the high character of his work as a lawyer and as a Judge; that has been most eloquently done. While I appreciate that to the full, I shall always cherish the memory of Frank Moore for what he was as a man. I esteem it as one of the peculiar privileges of my life to have had his warm personal friendship during the whole of my career at the Bar.

My acquaintance with him began at the October term of court at St. Helens in 1890, only four months after I had been admitted to practice. I was sent down there to look after a case by the firm with which I was associated, and Frank Moore appeared as attorney on the other side. I think I knew as little as the average young practitioner just beginning. There was a humorous incident that occurred at that time which Judge Moore never failed to speak of when I saw him, but with it began a warm personal friendship that I shall cherish as one of the valued memo-

ries of my life. I do not think I ever came to Salem that I did not drop in for a moment's conversation with him. I was always greeted with a kindly smile and a cheerful, genial conversation. One of the things that impressed me was the high-minded seriousness of the man's view of life, and correlatively there went with that, as there seems often to do with men of that type, a keen sense of humor which added a touch to his character and his life that made him a most agreeable companion.

Frank Moore did not wear his religion on his coat sleeve or make a parade of it. No man was further from indulging in cant than he, and yet, somehow, in associating with him, I was always impressed with the fact that he was a man of deep religious sentiment. Occasionally his conversation turned in that direction, and I became impressed that with him his religion was a real, deep thing. I learned from his conversation that to him the Man of Calvary was a real being, a real companion of his life. I became impressed with the idea that he made Jesus the pattern of his life. I think that sentiment pervaded all of his life and all of his work, and perhaps in some degree accounted for the thoroughness of his work.

I think the highest tribute I ever heard paid to the memory of any man was that paid to the memory of Frank A. Moore by the honored Chief Justice of this court in conversation with me a few weeks ago, when he said: "Frank Moore was the truest to his ideals of any man I ever knew." I can conceive of no higher tribute that can be paid to any man than that, coming from the lips of one who had been his close friend and associate for more than a generation.

It seems to me that we may fittingly say of Judge Moore, in the words of Tennyson's "In Memoriam": "God's finger touch'd him, and he slept."

Eloquent tribute has been paid to the devotion of Judge Moore to his wife, the companion of more than half a century, and it has seemed to me in recent months that something of the great heart of Frank Moore went before him when he lost his wife, and that he had no regrets when he followed after her. Knowing the man and his character as I did I can imagine him in the closing days of his illness that confined him to his home, consoling himself with the words of the Apostle Paul:

"When this corruptible shall have put on incorruption, and this mortal shall have put on immortality, then shall be brought to pass the saying that is written, Death is swallowed up in victory.

"O death, where is thy sting? O grave, where is thy victory?

Death has no terrors for a man who has lived the life that our lamented brother lived before this community for so many years.

Chief Justice MCBRIDE:

My Brethren of the Bench and Bar: Words are inadequate to express the regret of the members of this court at the loss of our friend and associate, Justice Moore. To those of us who for years had been associated with him upon the Bench, and who met him daily in consultation upon matters connected with our public duties, who knew him as an able Jurist, a wise counselor and faithful Judge and miss him as such, is added the grief that one feels when a beloved member of his family is claimed by the unrelenting hand of death. It is therefore with more than usual emotion that this court has heard the resolutions presented

by the Bench and Bar of this state and has listened to the beautiful tributes that have been paid to the memory of our distinguished brother.

The history of Justice Moore's career is inspiring in that it exemplifies what unaided industry and ability can accomplish when accompanied by unswerving integrity. Born in the State of Maine in 1844, a member of a large family, he inherited from his parents little beyond the rugged integrity and industry that characterized them. His early education was that afforded by the common schools of his native state, but fired with the ambition to go further along the difficult paths of knowledge, he embraced the occupation of a carpenter to earn the necessary means to accomplish that end. When a mere youth he left the paternal roof and removed to the State of Iowa, where, by the labor of his hands in the occupation I have mentioned, he was enabled to attend the higher schools of that state and the normal institute at Iowa Falls, receiving an education which, while not complete in the sense that a collegian would use that word, was sufficient for his professional purposes. After completing his normal studies he became a teacher and while teaching, engaged in the study of law under the direction of Lieutenant-Governor Eastman, one of the ablest members of the Iowa Bar. His success as a teacher brought about his election to the office of county school superintendent, an office which he held from 1871 to 1875. He was married in 1866 to Miss Emma Shintaffer, was admitted to the Bar in 1874 and began practice in 1875, being then practically penniless, with a family of young children to support. Finding the practice in the little town of Eldora not sufficiently remunerative, he came to Ore-

gon in 1877 and as a temporary business resumed teaching until he had amassed sufficient means to bring his family to Oregon, and in 1879 was admitted to the Bar of this court and began practice at St. Helens. Previous to his beginning the practice I had been the only attorney in that town, and being about to remove, he succeeded to my office, books and practice. St. Helens was then a small town and the law practice in Columbia County itself not large, but many of the litigants in Clarke and Cowlitz Counties on the Washington side of the river employed Judge Moore to attend to their business. The construction of the Northern Pacific railroad through Columbia and Cowlitz Counties brought an influx of population to both counties and a consequent increase of law business, so Judge Moore soon obtained a considerable business in these counties and was retained in many important cases. He was the local attorney for the Northern Pacific Railroad Company and looked after its litigation in these two counties in addition to his general practice. In 1884 he was elected County Judge, and in 1888 at the close of his term was elected state senator, which position he filled with conspicuous ability.

In 1892, when the State Republican Convention met, his friends proposed his name as a candidate for Justice of the Supreme Court. The principal objection to his candidacy came from those who thought him not sufficiently experienced in the practice of the law to fittingly fill that position, but those Judges and lawyers who had occasion to test him out as to the extent of his knowledge of the law, felt sure that his thorough knowledge of fundamental law, his fine sense of justice, and unflagging industry would make him

a valuable member of this court, and he was nominated and elected. His career here was such that there has never been anything beyond mere perfunctory opposition to his re-elections.

Such is a brief summary of the career of our deceased brother up to the time that he came to this Bench. It is only the merest outline. To speak of the strenuous struggles of his earlier life to overcome the adverse conditions which always beset the path of him whom poverty compels to carve out a successful career by his own exertions, would be to duplicate the struggles of many of those distinguished men who have fought their way to success through similar difficulties. Suffice it to say that our brother's pathway through life was never strewn with roses and often beset with thorns, but that through it all he maintained a resolute and honest purpose and a cheerful mind.

It is difficult to appraise our brother's services upon this Bench. His opinions were so uniformly well prepared and so carefully considered that one hesitates to select from the great number handed down by him and to say which among them are superior to the others. One method of judging of their comparative value is by noting the estimation in which they were held in other jurisdictions. During Justice Moore's service upon the Bench, there were current outside of the various law magazines, the American State Reports, American and English Corporation Cases, American Negligence Cases, Lawyers' Reports Annotated, and American & English Annotated Cases, each intended to contain decisions selected for their especial excellence on various legal subjects. The aggregate of Justice Moore's opinions

republished in these publications exceeds that of any other Judge in this state, and is above the average of the Judges of the highest courts in the other states of the Union, which is at once a tribute to his learning and a compliment to the court of which he was a member.

Never was a court confronted with so many novel propositions and changes in law and procedure as confronted this court during the last twelve years of Justice Moore's incumbency. The adoption of the initiative and referendum amendment to the Constitution, the local option law; the home rule amendment, the amendments to Article VII of the Constitution; the prohibition amendment; the Employers' Liability Law; the Workmen's Compensation Act; the act permitting the organization of ports, were for the most part unmapped legal territory through which the courts were compelled to travel with little aid from precedent. In all this pioneer work Justice Moore was conspicuous, doing his part, and more than his part, in the construction of new and frequently ambiguous legislation. The last ten years have witnessed more original constructive labor on the part of this court than has any other previous decade in the history of the state, and in that labor Justice Moore's record is that of faithful, industrious and accurate achievement.

We erect monuments of stone to perpetuate the names of our dead and upon these affection inscribes its tribute to the memory of the dear ones who rest beneath, but these are often colored by sentiment and exaggerated by love. The true monument of every man is his life and work. Each of us is building that monument for himself. Its inscriptions are inexor-

ably true and ineradicable. The monument that affection shall erect over the last resting place of our deceased friend may crumble into ruin, and its inscription be obliterated by the decaying finger of time, but in the Oregon Reports he has builded a monument which will endure for many years to come, and upon which lawyers and jurists will read the record of a faithful, able and impartial jurist, whose learning and industry have added luster to the Bench and dignity to the profession of the law.

Of Justice Moore as a man and a friend it is difficult to speak. To those of us who were his daily associates upon this Bench the bereavement is yet too recent to be dwelt upon with calmness. We miss his genial greeting. We miss his presence and wise counsel in our consultations. Judges may come and Judges may go but to those of us who for years enjoyed such intimate association with him, no one, however able, will ever supply his place in these relations.

In the resolutions adopted by the court we have sought to express our regret at his loss and our admiration for his character, but words fail to do justice to either.

It remains for me to speak of Justice Moore's personal characteristics. In all the relations of life he was an admirable man. As a friend he was warm and steadfast. He was an active friend upon whom one could rely in the time of stress, loving his friends and delighting in their society. It was my rare privilege to have been one of that number from the day he came to the state until his death. Our relations were always intimate and brotherly. We met in the noon of life and together we traveled its path toward the twilight, and I mourn him as one traveling in the wild-

erness with a loved companion sees him suddenly stricken down by his side, and himself left to continue the journey alone.

In the more intimate relations with his family, Justice Moore was all that could be asked of a true man. He was an affectionate husband and an indulgent and loving father. In later years affliction laid its heavy hand upon him. He lost a beloved son. His wife, whom he tenderly loved, was taken away after a long and distressing illness. Some affection of the heart for years rendered her hold on life momentarily precarious. He once told me he never heard his telephone ring while at his office without the fear that he would receive a message announcing her death or more serious illness. It is difficult to say how much this constant anxiety may have contributed to the conditions which brought about his own demise, or how far his great grief at the loss of the dear companion of so many years weakened his own hold upon existence.

Judge Moore was a sincere and earnest Christian, living his religion and practicing its precepts in his every-day life. In his daily life he carried out that precept of scripture that should characterize the conduct of every true man, and especially every true Judge which admonishes us to "Love mercy, do justice and walk humbly before God." If I were to select the distinguishing trait in Judge Moore's character, I would say that it consisted in faithfulness to duty.

As a man, as a Christian, as a lawyer, as a citizen and as a Judge, he was faithful to his ideals and lived and acted up to them. He is gone and his associates here, his professional brethren, his friends and our

citizens at large, mourn his loss, but the result of his labors and the memory of his virtues will live in the history of the state long after those here assembled shall have disappeared from the scene of life's activities, and lawyers of the future will quote his wise and learned opinions and say, "Thus spoke that true man and upright Judge, Justice Frank A. Moore."

The resolutions will be entered upon the records and printed in the next volume of the Oregon Reports and a copy sent to the relatives of our deceased friend.

The following resolutions have also been adopted by this court:

By the COURT:

Judge Frank A. Moore, whose death occurred September 25, 1918, enjoyed the distinction of having served continuously as a member of this court longer than any of his predecessors. He was first elected in June, 1892, taking his seat early in July of that year, and by successive elections remained here in active service until but a few weeks before he died. He was the only Justice of this court who died in office except Judge A. J. Thayer, whose passing happened in April, 1873.

Judge Moore was a tireless worker and exhausted research in every case he investigated. His writings began with *Liggett* v. *Ladd,* 23 Or. 26, decided October 5, 1892, and continued until early in June, 1918. During that period 5,241 opinions were rendered in this court, of which 1,215, or more than twenty-three per cent of the total, came from his pen. When we consider that there were but three Justices on the Bench most of that time, we are astonished at the prodigious task he accomplished; but the best of it is

the excellent quality of his work, which must challenge the admiration of every lawyer. He took pride in never slighting any opinion he wrote. No slipshod work can be attributed to him. He was master of the English language and the productions of his pen are classics in the judicial literature of the state. His service here covers a period in which were decided some of the most important questions that ever came before this court. The category includes cases involving the various amendments to the state Constitution, the creation of ports, the local option law, prohibition of the liquor traffic, and many others that might be mentioned. His work shows creditably and his name and fame are indelibly and honorably inscribed on Oregon's historic page.

His life and labor were characterized by rugged honesty of purpose. He scorned shams and deceit and earnestly sought for the truth of the matter in controversy. In all his rulings his unfailing design was to do justice.

He endeared himself to his associates by his uniform courtesy, his genial disposition and his kindness of heart. His long career is not merely unblemished; more than that, it is adorned by all the virtues of the best type of manhood. The influence he has wielded in the judicial concerns of Oregon will never lose its force, but will abide to tell us that he still lives.

ERRATA.

89 Or. 567, line 11 from top, read 85 Or. 359, instead of 80 Or.

87 Or. 625, line 2 from bottom of syllabi 8, change the words "of annuities" to "or immunities."

CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued June 26, modified July 23, rehearing denied October 15, 1918.

HEWITT *v.* LINNHAVEN ORCHARD CO.

(174 Pac. 616.)

Corporations—Insolvency — Preferred Stock—"Stockholder"—"Creditor."

1. Where a corporation, without statutory authority, secures the redemption of preferred stock by trust deeds on land, the holders of the stock are stockholders merely, and not creditors, and upon failure to redeem the certificates do not have a preference over general creditors.

[As to preferred shareholder as creditor or stockholder, see note in Ann. Cas. 1917B, 558.]

Corporations—Representations by Agent as to Stock.

2. The statement by an agent, selling preferred stock certificates, that they were secured by mortgages and were practically bonds, would not change the rights and liabilities of the purchaser, which are measured by his stockholders' contracts.

Corporations—Preferred Stock—Subscription Contract—Validity.

3. An agreement that preferred stock shall have priority over the general indebtedness of the corporation is void as to subsequent creditors, being against public policy.

Corporations—Sale of Stock—Nature of Contract.

4. The circumstances surrounding the issue of preferred stock *held* to evidence a sale of stock, and not a borrowing transaction.

Corporations—Mortgage—Priority.

5. A trust deed given as a mortgage to secure redemption of preferred stock is valid as a prior lien as against claims of common stockholders.

From Linn: WILLIAM GALLOWAY, Judge.

Department 2.

This is a suit by H. H. Hewitt, as trustee, for the purpose of foreclosing three trust deeds, given as mortgages by the defendant Linnhaven Orchard Company, as security for the redemption of certain certificates of preferred stock. The defendants and appellants Bernard Arndt, G. A. Sarles, Dora A. Sarles, Martha J. Leslie, John E. Paulson, C. H. Turner, M. J. O'Toole, Walter I. Howard, M. D. Van De Water, Alice B. Peniston, John Loretz, E. S. Nelson, Jane H. Baird and Jean Grant Spence are some of the purchasers of the tracts of land of the Linnhaven Orchard Company, who claim vendee's liens against the particular tracts described in their contracts of purchase. The defendants B. F. Raines, Charles Leonard, John Edwards and A. W. Smith claim certain liens upon the property in question by virtue of judgments rendered on account of labor performed, and merchandise sold to the defendant Orchard Company.

The trial court rendered a decree foreclosing the trust deeds as mortgages, and declared the same to be first lien for the amount of the several certificates of preferred stock, and interest thereon; that the judgments of defendants, B. F. Raines et al., composed the second class of liens, and that the appealing defendants, Bernard Arndt et al., were entitled to a subsequent lien for the amounts paid upon their respective contracts of purchase of their particular tracts.

The defendants, Bernard Arndt et al., who were purchasers of the several tracts of land embraced in plaintiff's mortgage, appeal, and claim that their liens should be first liens upon the mortgaged property.

The appellants further contended that their liens are prior to the judgment liens of defendants, B. F.

Raines et al., for the reason that their contracts are prior in date, and that said contracts were duly recorded long prior to the time when defendants B. F. Raines et al., reduced their claims to judgments.

The defendant Linnhaven Orchard Company was incorporated under the laws of the State of Oregon, in 1909, with a capital stock of $300,000,—$200,000 of which was common stock, and $100,000 was preferred stock. The par value of each share being $100. It is alleged in the complaint *inter alia* that said preferred stock was sold to various parties according to the plan adopted by the company on the following conditions:

"That said preferred stock of said company was entitled to draw an annual dividend as interest of 5 per cent out of the net profits of said company and was to be retired and redeemed before any dividend could be paid on the common stock of said company and was nonassessable.

"That said preferred stock was subject to redemption on or before five years from the date of the issuance thereof and the redemption of said preferred stock was to be secured by the conveyance of twenty acres of land to the plaintiff, H. H. Hewitt, as trustee for each block of five hundred dollars of said preferred stock, to be by him applied to the redemption of said preferred stock in accordance with the resolution adopted by said company on the first day of November, 1909.

"That the said preferred stock was not entitled to be voted at the stockholders' meetings of said company nor to participate in the profits of said company beyond its fixed preferential noncumulative annual dividend of five per cent per annum.

"Plaintiff further avers that after the organization of said company the said company purchased about twenty-five hundred acres of land, situated near Lebanon, in Linn County, Oregon, and planned the planting of an orchard thereon.

"That, on or about the fourth day of December, 1909, the said Linnhaven Orchard Company sold ten shares of said preferred stock to J. K. Haight and as evidence thereof issued to said J. K. Haight Certificate No. 72 for five shares of said stock and in said certificate that the east half of the northeast quarter of the northeast quarter of section 27, in township 11 south, range 1 west of the Willamette Meridian, in Linn County, Oregon, containing 20 acres, was conveyed to the plaintiff herein as trustee to secure the redemption of said stock in accordance with said plan of sale aforesaid."

The complaint then proceeds to make similar allegations in regard to certificates numbered 71 and 73 to 92, inclusive, giving the number of shares of stock, the name of the purchaser and the description of the particular tract by which it was secured, and alleges the execution of the three trust deeds for the purpose of securing the redemption of the certificates according to the plan of sale set forth; copies of the trust deeds being made exhibits to the complaint. That the certificates have not been redeemed except as to ten acres described in Certificate 71 of the company held by J. K. Haight.

The complaint then avers

"that said issue of preferred stock was made to evidence a borrowing transaction, wherein and whereby the said subscribers to said stock agreed to loan to the company the amounts of money represented by the par value of their respective certificates, payable on or before five years, with interest at the rate of 5 per cent per annum, and the company agreed to repay the same at the times and in the manner aforesaid, and to secure the payment thereof by trust deed to twenty acres of its said lands for each $500 so loaned to it as aforesaid; that said certificates of preferred stock above mentioned and described were issued pursuant to said agreement, and represent the

sums advanced and loaned to the company by said above mentioned preferred stockholders respectively, as aforesaid, and said trust deeds were given to the plaintiff, as aforesaid, pursuant to said agreement by way of mortgage securing to each of said preferred stockholders the repayments of the amounts represented by their respective certificates at the times and in the manner aforesaid; and that said borrowing transaction was so represented to each of said preferred stockholders at the time they purchased their respective certificates and paid for the same."

It is shown by the record that the promoters of the corporation obtained options to purchase about 3,000 acres of land, and transferred such options to the corporation in payment for the $200,000 common stock, and same was issued as "full-paid and nonassessable." One hundred thousand dollars of the common stock was returned to the treasury of the company. That the certificates of preferred stock, part of which was secured by the trust deeds, were accompanied by a like amount of common stock which was delivered to each purchaser as a bonus for purchasing the preferred stock; a commission of 10 per cent of the amount of the preferred stock being paid by the company for the sale thereof. It appears that in endeavoring to sell the preferred stock, public meetings were held, at which representations were made on behalf of the corporation to the effect that the preferred stock and the trust deed to secure it was practically a bond; that such representations were made to most of the defendants who purchased the preferred stock by the agent of the corporation in selling the same. The certificate of shares of the preferred stock contained the following clauses:

"The preferred stock represented by this certificate is entitled to an annual dividend of 5 per cent payable out of the net profits of said company and said stock

must be redeemed and retired before any dividends are payable on the common stock of the company and is nonassessable."

Also the following:

"The preferred stock is subject to redemption on or before five years from the date thereof, and the redemption of the preferred stock represented in this certificate is secured by tracts, here follows the number and description of the respective tract,"

and had an indorsement on the back thereof, signed by the trustee to the effect that the certificate is secured by deed of trust, giving the date of the deed, and the volume and page of county records where the same is recorded.

The defendants, Bernard Arndt et al., whom we shall designate as the purchasing defendants, made answer and counterclaim detailing circumstances of the sale of the several tracts asserting that for the purpose of selling the tracts, the defendant Linnhaven Orchard Company made certain false and fraudulent representations, which they relied upon to their injury, and that each of said defendants for himself entered into a contract for the purchase of tracts, "for the prices herein set forth":

Name.	Tract No.	Contract Date of.	Price Purchase.	Paid Amt.
Bernard Arndt	194	May 5, 1911	$2833.00	$1200.00
G. A. Sarles	195	Aug. 24, 1910	3600.00	1410.00
Dora A. Sarles	196	Jan. 27, 1912	3600.00	1200.00
Martha J. Leslie	197	Mar. 31, 1911	3600.00	1800.00
John E. Paulson	200	Mar. 30, 1911	3600.00	1200.00
C. H. Turner	201	Nov. 1, 1911	4200.00	1800.00
M. J. O'Toole	140	Aug. 24, 1910	4200.00	1800.00
Walter I. Howard	203	Jan. 19, 1911	3600.00	1800.00
M. D. Van De Water	204	Oct. 25, 1910	3600.00	1800.00
Alice B. Peniston	A–92–93	Feb. 18, 1913	2100.00	300.00
John Loretz	93½	Nov. 12, 1912	2100.00	600.00
E. S. Nelson } Jane Baird }	½ of 92–93	Sep. 1, 1911	2400.00	600.00
Jean Grant Spence	141	Jan. 28, 1913	4200.00	1200.00"

That on account of the failure of the Orchard Company to comply with the terms of the contracts, and its inability to convey a good title, each of said defendants refused to make further payments upon his or her contract, and has rescinded the same and also allege as follows:

"That the liens of the defendants herein mentioned as to the particular tracts upon which said liens exist, are prior to the lien and claim of plaintiff herein, said lien and claim of each of said defendants being as of the date of the contract of said defendants as herein set forth and alleged."

The defendants and respondents claiming judgment liens by their answers set forth the same judgment liens as in the case of *First Savings Bank of Albany, Oregon,* v. *Linnhaven Orchard Company,* in which an opinion by this court has this day been rendered, to which reference is hereby made. MODIFIED.

For appellants there was a brief over the names of *Mr. John McCourt, Mr. Samuel M. Endicott* and *Mr. Walter C. Winslow,* with an oral argument by *Mr. McCourt.*

For plaintiff-respondent there was a brief and an oral argument by *Mr. C. E. Sox.*

For defendants-respondents there was a brief over the name of *Messrs. Weatherford & Weatherford,* with an oral argument by *Mr. James K. Weatherford.*

BEAN, J.—1. The question for determination is as to the priority of the claims and liens of the respective parties. In addition to the contention made on behalf of the appealing defendants in the case of *First Savings Bank* v. *Linnhaven Orchard Co.,* 89 Or. 354 (174

Pac. 614), these defendants challenge the right of the preferred stockholders to obtain security by virtue of the trust deeds given as mortgages to secure the redemption of their certificates of stock, to the exclusion of the general creditors of the corporation.

The statutes of some of the states authorize corporations to dispose of preferred stock to a certain amount, upon certain conditions and guarantee holders of such stock dividends, and to secure the redemption of the same. Article XI, Section 3, of our Constitution provides that the stockholders of all corporations shall be liable for the indebtedness of the corporation to the amount of their stock, subscribed and unpaid. The general rule is that a preferred stockholder possesses all the rights, and is subject to the general liabilities of ordinary stockholders. The rights of preferred stockholders, like those of common stockholders, depend upon their contract with the corporation: 7 R. C. L., § 170, p. 200; *Heller* v. *National Marine Bank,* 89 Md. 602 (43 Atl. 800, 73 Am. St. Rep. 212, note page 231, 45 L. R. A. 438).

Preferred stockholders, as well as common, in a certain sense are creditors. It is in the sense that a corporation includes all its capital stock among its liabilities, but it is a liability which is postponed to every other liability. As such a creditor, a stockholder is subordinate to every other creditor of the corporation. In the ordinary sense, a stockholder cannot be a creditor of the corporation by virtue of his ownership of stock: *Belfast & M. L. R. Co.* v. *Belfast,* 77 Me. 445 (1 Atl. 362). It has frequently been attempted to issue stock which shall at once prefer its owners to the holders of common stock, and protect them against any subsequent indebtedness of the corporation by giving their claims priority over subse-

quent creditors. These attempts have usually proved futile. As a matter of public policy, a stockholder cannot claim an interest in the property of a corporation paramount to the rights of creditors, whatever rights he might have in relation to his fellow-stockholders. A corporation cannot in the absence of statutory authority make its preferred stock a lien upon its property as against general creditors: 7 R. C. L., § 171, p. 201; 2 Clark & Marshall on Corporations, p. 1313.

A preferred stockholder is either a stockholder or a creditor. He cannot by virtue of the same certificate be both; he does not sustain a dual relation to the corporation. A stockholder takes a risk in the concerns of the company not only as to dividends and a proportion of assets on the dissolution of the company, but as to the statutory liability for debts in case the corporation becomes insolvent. A creditor takes no interest in the company's affairs; is not concerned in its property or profits as such: 4 Thompson on Corporations (2 ed.), § 3607, p. 186.

2. The fact that the agent of the defendant corporation, making the sales of the preferred stock in question, stated to the purchasers thereof, or to the public, that the certificates of the stock were secured by mortgage, and were "practically a bond" would not change the obligation of the contract.

Such mortgages are referred to in 1 Cook on Stock and Stockholders and Corporation Law (3 ed.), Section 271, page 370, in the following language:

"Occasionally, however, a mortgage is given by the corporation to secure the payment of dividends on preferred stock and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal except where it is issued

under express statutory authority. It is difficult to see how stockholders can contrive legally to obtain a preference over corporate creditors secured or unsecured, as they would do by such a mortgage."

3. An agreement to secure preferred stockholders so that their claims will be prior to the general indebtedness of the corporation is against public policy and void as to subsequent creditors of said corporation: *Hamlin* v. *Toledo, St. L. & K. C. R. Co.*, 78 Fed. 664 (37 C. C. A. 587, 36 L. R. A. 826); *Miller* v. *Ratterman*, 47 Ohio St. 141 (24 N. E. 496); *Heller* v. *National Marine Bank*, 89 Md. 602 (43 Atl. 800, 73 Am. St. Rep. 212, note at page 228, 45 L. R. A. 438); *Lloyd* v. *Pennsylvania Electric Vehicle Co.*, 75 N. J. Eq. 263 (72 Atl. 16, 138 Am. St. Rep. 557, 20 Ann. Cas. 122, note, 21 L. R. A. (N. S.) 228); note to *Field* v. *Lamson & Goodnow Mfg. Co.*, 167 Mass. 388 (38 N. E. 1126, 27 L. R. A. 136).

A person holding interest-bearing stock, payable out of the profits of a concern, is a stockholder, and not a creditor: Elliott on Railroads, § 86; *Heller* v. *National Marine Bank*, 89 Md. 602 (43 Atl. 800, 73 Am. St. Rep. 212, note at page 220, 45 L. R. A. 438).

In *Heller* v. *National Marine Bank*, 89 Md. 602 (43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438), one of the principal cases upon which plaintiff relied, it was held that the holder of preferred stock, so called, was entitled to a preference as to capital over subsequent mortgages and other encumbrances, where the statute under which the "preferred stock" was issued expressly declared that it should be and constitute a lien on the franchise and property of the corporation, and have priority over any subsequent mortgages or other encumbrances: See note to *Lloyd* v. *Pennsylvania Electric Vehicle Co.*, 75 N. J. Eq. 263 (72 Atl.

16, 138 Am. St. Rep. 557, 20 Ann. Cas. 122, 21 L. R. A. (N. S.), at p. 230).

4. In the present case, the record discloses that the $200,000 of common stock was considered fully paid up by the transfer to the corporation of options to purchase about 3,000 acres of land. So that the capital of the company was principally realized by the sale of preferred stock. The provision in the certificate that the preferred stock was not entitled to vote nor participate in profits beyond its preferential dividends of 5 per cent per annum, was practically neutralized by the transfer as a bonus of an equal number of shares of common stock to each purchaser of preferred stock. All of such purchasers were interested in the affairs of the company, and were affected by its success or failure. The preferred stock was offered for sale upon the market and plaintiff alleges in his complaint that it was sold to the several persons. The agent of the company was allowed 10 per cent for making the sale. The averment of plaintiff, of the conclusion that the "issue of preferred stock was made to evidence a borrowing transaction" under the law in this state, and the facts of this case, is not borne out. We think the transaction was a sale of shares of stock, and not a loan to the corporation.

The creditors of the corporation should first be provided for before the holder of preferred stock in the corporation would have the right to have the company return to him his money with interest, when the corporation is unable to pay all its debts. The various suits involving the affairs of the Linnhaven Orchard Company illustrate its condition. The manager of the corporation stated that in 1914 the mortgage indebtedness of the company was $52,361, and the floating indebtedness $10,444. The company is insolvent.

We find no authority contrary to this holding except where preferred stockholders are by special statutes given a right to a lien upon the property of the company. The purchasing defendants were residents of eastern States, and had no actual knowledge of the status of the corporation at the time they made their purchases and payments.

As to the defendants, B. F. Raines et al., who claim judgment liens, we see no reason for any further discussion than that in the case of *First Savings Bank* v. *Linnhaven Orchard Co., supra.*

5. As against the holders of the common stock of the company, we hold that the trust deeds are valid as mortgages, but the lien of plaintiff by virtue thereof must be postponed to the claims of the defendants against the defendant company.

The decree of the lower court will be modified so as to declare the purchasing defendants, Bernard Arndt et al., each to have a lien upon the respective tract purchased by him or her, and that such liens are superior in right to plaintiff's mortgages; that such purchasing defendants are entitled to have their claims satisfied from the proceeds of the sale of said land next after the satisfaction of the judgment liens of defendants, B. F. Raines et al., and before the payment of plaintiff's mortgages.

MODIFIED. REHEARING DENIED.

McBRIDE, C. J., BENSON and JOHNS, JJ., concur.

Argued July 25, modified October 15, 1918.

GUILLIAMS *v.* BEAVER LAKE CLUB.

(175 Pac. 437.)

Navigable Waters—"Navigable Stream"—Common Law.

1. At common law all streams on which the tide ebbed and flowed were *prima facie* "navigable," and all other streams were held to be private or unnavigable.

Navigable Waters—Navigability—Test.

2. The test of navigability which is applied in most of the jurisdictions in the United States, including the Supreme Court of the United States, is navigability in fact.

Navigable Waters—Classes.

3. Streams and bodies of water as regards navigability are divided into several distinct classes: (1) Those in which the tide ebbs and flows; (2) those which are navigable in fact for boats, vessels, or lighters; (3) streams not navigable for any purpose; and (4) the larger rivers susceptible of a great volume of commerce.

Navigable Waters—Capacity for Floatage.

4. A stream capable in its natural state of floating sawlogs to market successfully is navigable for that purpose.

Navigable Waters—Riparian Owners—Right to Water.

5. Conceding that title to bed of stream which is navigable in fact is in riparian owners, they do not own the water itself, but only the use of it as it flows by their property.

[As to riparian proprietor's right to use and detain water, and to the natural flow of the stream, see note in 79 Am. Dec. 638.]

Navigable Waters—"Navigability"—Test.

6. The test of navigability of a stream is its capacity to afford the length, width, and depth which enables boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks.

Navigable Waters—"Commerce"—Pleasure Boats.

7. A vessel carrying a load of passengers to a picnic is in law as much engaged in "commerce" as one carrying grain or other merchandise.

Navigable Waters—"Navigable Stream."

8. A stream having well-defined banks, a well-defined channel, and a fairly constant depth of water sufficient to enable small boats and scows capable of conveying cattle, hay and other products to traverse its waters at all seasons, possesses a qualified navigability.

Navigable Waters—Navigability—Evidence.

9. In suit to enjoin defendant riparian owner from obstructing the outlet of a stream having a qualified navigability, up to his

property, but not beyond, by dam or otherwise, *held*, that plaintiffs have the right to navigate the stream down to and across lands of defendant under water, but that the dam is practically the limit of such navigation.

Navigable Waters—Use of Shore.

10. Those using a stream having a qualified navigability have no right to land on the premises of a riparian owner without his permission.

Navigable Waters—Right to Divert Channel.

11. Although it was necessary that defendant be permitted to build proposed dam to protect its land from erosion, it may be enjoined from placing any obstruction in non-navigable stream until it constructs a channel of sufficient capacity to carry off the water to the same extent as the natural channel.

From Lincoln: JAMES W. HAMILTON, Judge.

Department 2.

This is a suit to enjoin defendant from erecting or maintaining a dam near the mouth of Beaver Creek in Lincoln County, and to prevent the defendant from maintaining a wire fence across said creek. Beaver Creek is a small nontidal stream of insignificant size at a point 3½ miles above the ocean, but at its mouth, by reason of the sands thrown up by the sea, it becomes a lagoon or lake practically without current, of an average width from bank to bank of about 50 feet, and of a depth sufficient to float ordinary skiffs and small scows. It is shown that five persons living above the land of defendant have rowboats, and that there are two or three small scows being used to navigate such portions of the lagoon as occasion requires, and that there has been more or less navigation thereon for more than twenty years. Where the lagoon reaches within approximately 100 yards of the west line of defendant's land, it again exhibits a perceptible current, and from thence flows rapidly into the ocean over a practically unnavigable bed. This part of the stream changes its bed frequently by rea-

son of the winter storms, which deposit the sands at its mouth and up to and beyond defendant's west line. It is also shown that the waves of the ocean upon such occasions drive logs and driftwood even up into the still waters of the lagoon above. It further appears that on some occasions the sand is deposited in such quantities as to completely obstruct the flow of the creek into the ocean for several days at a time, but such occurrences are very infrequent. There is an interval between that portion of the lagoon capable of floating boats and the line of ordinary high tide, although it is shown that on at least one occasion two men, by wading the shallow portion of the stream in gum-boots, one man on each side of the skiff, managed to get it over the shallow water and into the breakers, but it may be reasonably said that navigation by small boats terminates on defendant's land, and in order to get to the line of ordinary high tide it is necessary for persons coming down the stream to go across defendant's premises, and that even such travel is confined to three or four individuals. It is shown that at some seasons of the year salmon ascend the stream into the lagoon, but it does not appear that it is fished at present for commercial purposes. It is shown that trout in considerable numbers abound in the lagoon and that there is more or less trout fishing engaged in during the summer months. It is also shown that by reason of the southerly winter storms, the sand from the sea has dammed up the mouth of Beaver Creek, and diverted its course further to the north, so that its course since 1915, instead of being generally in a northwesterly direction across the west side of defendant's land, has changed to a northerly direction and in some places east of north. This change has washed away a portion of defendant's land, and threat-

ens gradual destruction of a tract of from 40 to 60 acres, which the evidence tends to show contains the possibilities of a valuable cranberry tract, although only a small patch 60 or 70 feet square has been planted to cranberries. To protect this land from erosion the defendant attempted to construct a dam across the new channel of Beaver Creek running transversly across the creek in a general direction from west to east, and to make a new channel to the beach running in a general westerly direction, but failed to make the new channel deep enough to carry off the surplus water of the lake so that the dam backed up the water over the lands of plaintiffs, threatening some injury to their hay crops and to their pasturage on the low lands adjacent to the lake. A heavy storm caused the breakers to beat against the dam, and a part of the materials of which it was composed to be carried about a mile up the lagoon, thereby impeding to some extent the passage of small boats. This suit was brought to enjoin defendant from obstructing the outlet of Beaver Creek by dam or otherwise. The Circuit Court made the following findings of fact and decree:

"First: That Beaver Creek is a stream navigable by boats and that plaintiffs have lands situated on both sides of said stream; that the plaintiff Hester H. Coovert does not appear to have any interest in land situate along said stream.

"Second: That the defendant is the owner of real property on both sides of said stream below plaintiffs, being between plaintiffs' land and the confluence of said Beaver Creek with the Pacific Ocean.

"Third: That the defendant, for the purpose of protecting its lands from erosion caused by the changing conditions of the current of this stream, commenced to build and did complete a diversion dam in said stream.

"Fourth: That in constructing said dam defendant has to some extent caused the water to back and flow on to some of the lands of plaintiffs, doing some injury, but the extent of which does not appear in the evidence in this case.

"Fifth: That a short time after the completion of said dam it was swept out by the storms, and now remains an obstruction in said stream.

"Sixth: That the lands of defendant are so situate on said stream that the diversion of the waters thereof is highly necessary to preserve their said lands; that it appears from the evidence that another channel furnishing an outlet for the waters of said stream can be constructed, and the property of defendant protected, and at the same time plaintiff's land not injured.

"Seventh: That it appears from the evidence that defendant did not take the necessary precaution while building said dam to protect plaintiffs' property.

"Based upon the findings of fact and conclusions of law filed herewith in the above-entitled court and cause, it is hereby ordered, adjudged and decreed that defendant, its servants and agents, are hereby enjoined and restrained from materially backing the waters of Beaver Creek in Lincoln County, Oregon, over or upon the lands of any of plaintiffs; and that said defendants, its servants or agents, be and are hereby enjoined and restrained from turning the waters of said creek from its present channel until defendant has provided a new channel as suitable for navigation and affording an outlet for said waters as the present channel.

"Subject to these conditions and limitations defendant is permitted to divert the waters of said stream in protection of its said property.

"That plaintiffs recover from defendant their costs incurred herein."

From which decree defendant appeals.

MODIFIED.

For appellant there was a brief over the names of *Mr. Lawrence A. McNary* and *Mr. Edward J. Clark,* with an oral argument by *Mr. McNary.*

For respondents there was a brief submitted by *Mr. B. F. Jones.*

McBRIDE, C. J.—The case has two aspects, one being with reference to the navigability of the stream or lake in controversy, and the other as to the flowing back of its waters to the injury of other properties along its banks. We have been somewhat hampered in our investigations by the indefiniteness of the questions and answers in matters such as boundaries, etc., involved, where precise answers were required. To illustrate the difficulty as well as to point out a moral, we quote a few excerpts from the testimony:

"Q. In the summer-time, when you came down the creek, where did you land your boat?

A. We landed it all the way from where the Club House is here. (Indicating.)

Q. Here is the position of the Club House?

A. We land from that all the way down in here."

There are pages of this sort of questions and answers, all of which may have been plain to the trial judge, who had the witness and the map before him, but the location of "here" and "there" is somewhat misty to one who does not have that advantage. We call attention to this not because the attorneys in this case are negligent in this respect beyond hundreds of others, but to suggest that if "here" and "there" and "yonder" were always tied to some letter of the alphabet or designated by numerals, of which our system of notation furnishes unfailing and adequate combinations, the appellate court would be better able to properly understand and appraise the testimony.

1–3. We address ourselves to the first question. Is Beaver Creek, or lake, navigable within the meaning of the law? At common law, all streams on which the

tide ebbed and flowed were *prima facie* navigable, and all other streams were held to be private or unnavigable, but this rule arose from the fact that in England the rivers generally were of insignificant size and length, furnishing no facilities for commerce or general public use. On the continent of Europe, where the rivers were in fact navigable, that fact furnished the test, which is the test applied in most of the jurisdictions of this country, including the Supreme Court of the United States: *Shaw* v. *Oswego Iron Co.*, 10 Or. 371 (45 Am. Rep. 146), and cases there cited. As shown in that opinion, streams and bodies of water are divided into several distinct classes. (1) Those in which the tide ebbs and flows, which are technically denominated navigable, in which class the sovereign is the owner of the soil constituting the bed of the stream, and all right to it belongs exclusively to the public. (2) Those which are navigable in fact for boats, vessels, or lighters. In these the public has an easement for the purposes of navigation and commerce, they being deemed public highways for such purposes, although the title to the soil constituting their bed remains in the adjacent owner, subject to the superior right of the public to use the water for the purposes of transportation and trade. (3) The streams which are so small and shallow that they are not navigable for any purpose, the public has no right to whatever. (4) To this list may be added our larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public.

It is obvious that the body of water here in litigation does not belong to the first class, as it is nontidal and has never been meandered but has been sectionized and disposed of as so much land. In some respects

the conditions are similar to the case made by the plaintiff in *Shaw* v. *Oswego Iron Co.*, 10 Or. 371 (45 Am. Rep. 146), the distinction between the cases being pointed out later. The real crux of this case lies in properly defining the rule as to what constitutes navigation. It is also clear from the testimony that Beaver Lake cannot be included in the fourth class of waters, as it is not contended that it is susceptible of being an artery of any very extended commerce.

The term "navigable waters," as applied to non-tidal streams, has been often defined by the courts of this country, and while some of the definitions are apparently somewhat conflicting, yet when read with reference to the particular circumstances of each case they substantially agree. We select the following instances from the many collated in 2 Words and Phrases (2 ed.), 526. In Illinois the term has been defined as follows:

"A stream, in order to be 'navigable,' must be of common or public use for the carriage of boats and lighters, and of bearing up and floating vessels for the transportation of property conducted by the agency of man. It is navigable in fact only when it affords a channel for useful commerce, and is a practical utility to the public as such, and in its ordinary natural condition furnishes a highway over which commerce is or may be carried in the customary modes of conducting commerce by water. It is not sufficient that it is available in places for rowboats or small launches, or that hunters and fishermen pass over the water in boats used for that purpose: *People* v. *Economy Light & Power Co.*, 241 Ill. 290 (89 N. E. 760, 771); *Schulte* v. *Warren*, 218 Ill. 108, 119 (75 N. E. 783, 785, 13 L. R. A. (N. S.) 745).

From Wisconsin we have the following definition:

"The term 'navigable stream' is not limited to a tide-water stream, but the question in each case is

whether it is in fact navigable; that is, used or susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Willow River, an indirect tributary of the Mississippi, capable of floating logs at certain seasons of the year and carrying rowboats, although not meandered, and so shallow that in places the boats have to be pushed, is a public 'navigable stream': *Willow River Club* v. *Wade,* 100 Wis. 86 (76 N. W. 273, 276, 42 L. R. A. 305)."

From North Carolina we have the following:

"If a stream is 'navigable in fact, it is navigable in law': Gould, Waters (3 ed.), 67. The capability of being used for purposes of trade and travel in the usual and ordinary mode is the test, and not the extent and manner of such use. * * Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town on the shore, with numerous streets and wharves, or whether * * one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access to the land. It is the navigability of the water that is the test": *State* v. *Twiford,* 136 N. C. 603 (48 S. E. 586, 587).

From Kansas, we have the following:

"Any water, to be 'navigable,' must be susceptible of use for purposes of commerce, or possess the capacity for valuable floatage in transportation to market of the products of the country through which it runs, and must be of practical usefulness to the public as a public highway in its own state and without the aid of artificial means; a theoretical or potential navigation or one that is temporary, precarious, and unprofitable not being sufficient: *Dana* v. *Hurst* (*Hurst* v. *Dana*), 86 Kan. 947 (122 Pac. 1041, 1042)."

4. The cases in this court have arisen mainly with respect to the floatability of streams for the purpose of conveying sawlogs to market, in which it is held in

effect that a stream capable in its natural state of floating sawlogs to market successfully, is navigable for that purpose: *Weise* v. *Smith,* 3 Or. 445 (8 Am. Rep. 621); *Shaw* v. *Oswego Iron Co.,* 10 Or. 371 (45 Am. Rep. 146); *Haines* v. *Welch,* 14 Or. 319 (12 Pac. 502); *Nutter* v. *Gallagher,* 19 Or. 375 (24 Pac. 250); *Micelli* v. *Andrus,* 61 Or. 78 (120 Pac. 737); *Kamm* v. *Normand,* 50 Or. 9 (91 Pac. 448, 126 Am. St. Rep. 698, 11 L. R. A. (N. S.) 290).

Some of the federal authorities introduce another element into the definition of "navigable waters," namely: that of public ingress and egress to the stream. Thus, in *Harrison* v. *Fite,* 148 Fed. 781 (78 C. C. A. 447), it is said:

"To meet the test of navigability as understood in the American law, a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a watercourse need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation: *Toledo Liberal Shooting Co.* v. *Erie Shooting Club,* 90 Fed. 680 (33 C. C. A. 233); *Moore* v. *Sanborne,* 2 Mich. 520, 524 (59 Am. Dec. 209); *Morgan* v. *King,* 35 N. Y. 454,

458 (91 Am. Dec. 58); *Brown* v. *Chadbourne,* 31 Me. 9 (50 Am. Dec. 641); *Griffith* v. *Holman,* 23 Wash. 347 (63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178); *Wethersfield* v. *Humphrey,* 20 Conn. 218; *Rowe* v. *Granite Bridge,* 38 Mass. 344; *Gaston* v. *Mace,* 33 W. Va. 14 (10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392); *Neaderhouser* v. *State,* 28 Ind. 257; *Rhodes* v. *Otis,* 33 Ala. 578 (73 Am. Dec. 439); *Railroad* v. *Brooks,* 39 Ark. 403 (43 Am. Rep. 277)."

This view of the law seems to have the approval of the Court of Errors and Appeals of the State of New Jersey in *King* v. *Muller,* 73 N. J. Eq. 32 (67 Atl. 380), wherein the court quoted with approval from 1 Farnham on Waters, page 100, the following excerpt:

"A navigable body of water is one which the public has a right to use for the purposes of navigation. The term includes all waters which for a period long enough to be of commercial value are of sufficient capacity to float water craft for the purposes of commerce, or to float to market the products of the country through which the water extends, so as to be useful to the population along its banks. * * The stream must be of some value to trade, commerce or agriculture. And this excludes waters which are merely capable of floating a skiff for pleasure. And to be useful for these purposes the water must connect with other waters or lead from one public place to another, so as to be in the path of commerce. So, a stream is not navigable so as to be a public highway which leads from a public river to a private house, or to which the public have no access except at one point, where a highway approaches it. In order to be public it must have a terminus by which the public can enter it, and another from which it can leave it. But a stream to be public need not lead from one county to another. The rights of the public are entirely dependent on the capacity of the stream for navigation."

The authorities above cited seem in substantial accord as to the proposition that for a stream to be con-

sidered navigable in fact, must be of such depth as to be in its natural state capable of being a useful means of trade and travel and of contributing in some degree to commerce; but there is an apparent divergence as to whether the test is by the actual commerce being carried on, or the potentialities of commerce in the future. As will be seen by the case last quoted, some courts seem to make the present conditions on the banks of the stream, or lake, the test of its navigability, rather than the condition of the body of water itself. The test applied in *King* v. *Muller,* 73 N. J. Eq. 32 (67 Atl. 380), carried to its logical conclusion, might entirely exclude from the right of navigation over a body of water deep enough and broad enough to float the largest vessel and miles in length. A single riparian owner, if perchance there were no public egress from the stream, would be debarred from the privilege of navigating his boat over its waters beyond the confines of his own land, and the stream itself be fenced by each riparian owner so as to make each portion of it adjoining such riparian property a private reserve. It is needless to say that the very eminent jurist who applied the language used by Mr. Farnham as a test of navigability of a body of water, did not intend that such test should be the sole criterion, but was applying it to the concrete case then under consideration, which was where a canal leading to a lake originally unnavigable but made susceptible to some sort of navigation by a dam erected at its outlet, had been constructed by private owners from their own premises to the lake in question, in which case it was held in substance that the construction of the artificial channel for the constructor's own use and upon his own property, did not operate as a dedication of it to

the public, and that it was not a public navigable stream.

The case of *Harrison* v. *Fite*, 148 Fed. 781 (78 C. C. A. 447), the language of which we have quoted, would seem to support defendant's contention, but when considered with reference to the facts it does not go to the extent claimed by the defendant here, as the court found that the alleged lake, the navigability of which was one branch of the controversy, was in fact an unnavigable swamp, and that Little River, whose navigability was the remaining subject of contention, was not navigable for the reasons which we quote:

"Witnesses testified that in times of high water there has been no successful navigation of it in recent years, except with gasoline launch drawing but a few inches of water, and with canoes, skiffs, and dugouts of the hunters and fishermen; that it is not being used to float the products of the fields and forests to market, and cannot be profitably and successfully used for that purpose. And, if practical adaptability and usefulness are the tests, the finding of the court under the evidence was right."

5. While there are many authorities which seem to lean to the doctrine that the present use of a stream for the purposes of trade or commerce is the test of its navigability, we are not prepared to say that such is the only test, or to go so far even as to say that its only test is its capacity to carry goods or articles of trade to and from the place where they are marketed. This is comparatively a new country and there are many streams and lakes whose shores are sparsely if at all settled and which in their natural state may, as settlements along their borders continue, become valuable highways for the carriage of the produce of those who may reside along their banks. Public highways

may be constructed and towns built where people may reside for the purposes of health, pleasure, or profit, and where actual navigability of the water exists, courts should not lightly consign them to unrestricted private ownership. Whatever may be the title to the bed of such streams or bodies of water (and it may be conceded in this case that such title is in the riparian proprietors) they do not own the water itself but only the use of it as it flows past their property. Under the conditions prevailing in this comparatively new country we are not prepared to say that bank conditions upon a stream actually navigable so far as water conditions are concerned, should always be controlling. As remarked in *Hickok* v. *Hine,* 23 Ohio St. 523 (13 Am. Rep. 255):

"The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce."

To the same effect is *Sullivan* v. *Spotswood,* 82 Ala. 163 (2 South. 716).

6–8. Nor are we prepared to say that the facility for transportation of goods and commodities to and from market is an infallible test of the navigability of a body of water. The Columbia River, in a legal sense, was just as navigable a century ago when it "heard no sound save its own dashing" as it is with the commerce of three states being borne upon its waters. The test of navigability of a stream in the summing up, is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks. The latter are changeable and subject

to the will of man, the former is a physical condition dependent upon nature. Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure. The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise. We think it only fair to assume that a train carrying passengers only between Portland and San Francisco is as much engaged in interstate commerce as any other train on the road. One has only to glance at the multitude of definitions of "commerce" collected in "Words and Phrases" under that title to see what an extended meaning the courts have given it. Take the case at bar as an example. Here is a body of water 3½ miles long with an average width of at least 50 feet, and a depth capable of floating successfully skiffs and small boats of average size, and scows capable of conveying cattle, hay and other products, and affording a surface over which people may travel for pleasure, or for the purpose of fishing and of which the defendant is one of several riparian proprietors. Is it in accord with sound public policy that each riparian owner shall have the right to fence his portion of the stream and say to those above and below him, "This body of water is mine; 'Thus far shalt thou go and no farther' "? We think not. While perhaps a majority of the decisions would, upon a cursory reading, appear to sanction such obstruction, and while some actually seem to apply the common-law rule in regard to navigable waters to our smaller fresh-water streams, a careful examination of these decisions will show that such streams were not in fact navigable, but, on the con-

trary, boats were merely pushed and hauled over the shallow beds, and that this so-called "navigation" was used as a pretext to enable the "navigators" to trespass on lands not their own for the purpose of fishing and hunting. In the case at bar the stream has well-defined banks, a well-defined channel, and a fairly constant depth of water to enable boats of the description above set forth to traverse its waters at all seasons, and to that extent we hold that it possesses a qualified navigability.

The whole question here considered came before the Supreme Court of Minnesota in *Lamprey* v. *State*, 52 Minn. 181 (53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670). That case seems so exactly to coincide with the case at bar and the general conditions are so similar to those existing in this state, that we quote from it the following:

"In this country, while still retaining the common-law classification of navigable and non-navigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held

to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts 250 years ago, reserved to public use her 'great ponds,' probably only fishing and fowling were in mind, but, as is said in one case, 'with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise'; *West Roxbury* v. *Stoddard,* 7 Allen, 158. If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule."

9, 10. We conclude that plaintiffs have a right to navigate the stream down to and across the lands of defendant, and that defendant's dam is practically the limit of such navigation; that the stream below this is incapable of navigation and that plaintiffs cannot go beyond this without trespassing on defendant's premises, the westerly line of which we find to be the meander line shown on the map submitted in evidence. Neither have the plaintiffs any right to land at any point on defendant's land without permission. This disposes of one branch of the case.

11. The remaining matter in controversy relates to the flowing back of the water by reason of the erection of the dam. It is evidently necessary that the defendant should be permitted to build the dam proposed in order to protect valuable land from erosion. It also appears that in building such dam they have not used sufficient care to protect the lands of other riparian owners from overflow, and although the present damage has been slight yet its recurrence—and it seems likely to recur if the method heretofore pursued is continued—will be a continuing injury to plaintiff's lands, and defendant should be enjoined from placing any dam or other obstruction in the stream until it has constructed a channel to the beach of sufficient capacity to carry off the water of the creek to the same extent as the natural channel.

The whole case is before us upon the pleadings and testimony, and in the interest of all parties it should be fully settled here. Each party is claiming more than it is entitled to, therefore, the decree below will be modified by enjoining defendant from obstructing the stream by dam, or otherwise, at any point at or above the dam shown in the testimony, and from rebuilding the same at any place in the stream, until it

has provided a channel of sufficient capacity to prevent such dam from overflowing the land of plaintiffs; and plaintiffs, and each of them, shall be enjoined from landing or going upon the lands of defendant between the westerly meander lines above described and its easterly boundary, without defendant's permission, and that neither party recover costs in this court. In all other respects the decree is affirmed. MODIFIED.

JOHNS, BEAN and BENSON, JJ., concur.

Argued June 7, reversed and remanded July 9, rehearing denied October 15, 1918.

WALLACE v. OREGON ENGINEERING CO.

(174 Pac. 156; 175 Pac. 445.)

Contracts—Construction—Incorporation by Reference.

1. A reference in a subcontract to the general contract for a particular purpose makes it a part of the subcontract only for the specified purpose..

Contracts—Construction—Incorporation by Reference.

2. An agreement that contractor shall not sublet the work without the written consent of the original contractee is for the benefit of, and may be waived by, the latter.

Contracts—Conditions Against Subletting—Effect.

3. A contractor may make a valid contract to sublet the work, although in violation of the provision of the original contract prohibiting subletting without the written consent of original contractee, after which the securing of consent is the duty of contractor and not of subcontractor.

Contracts—Written Contracts—Presumption.

4. It is presumed that all the terms of a written contract are embraced therein, and, where there is no provision that subcontractor should obtain the consent of original contractee to the subletting, none will be presumed.

Contracts—Construction—Settlement of Disputes.

5. A provision in a general contract that the engineer shall settle disputes *held* not to authorize the engineer to decide the validity of a

contract between contractor and subcontractor, nor oust the jurisdiction of the courts in actions for breach thereof.

[As to conclusiveness of decision of architect or engineer under working contract, see note in **Ann. Cas.** 1913A, 180.]

ON MOTION FOR REHEARING.

Appeal and Error—Disposition—Rendition of Judgment.

6. Where judgment of nonsuit is reversed, notwithstanding it appears on the face of the record that plaintiff is entitled to recover a specific amount, the case will be remanded for new trial where under the issues defendant might tender evidence to contradict the *prima facie* case.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2.

This is an action for damages for the breach of a contract. The cause was tried before a jury. At the close of the evidence, the court granted defendant's motion for nonsuit. Plaintiff appeals.

In 1915, the Oregon Engineering and Construction Company entered into a contract with the South Fork Water Commission of Oregon City, Oregon, by which contract the Oregon Engineering and Construction Company agreed with the water commission to construct a water system for the City of Oregon City for approximately $119,293. The contract was in printed form and embraced the stipulations and agreements and also proposals, plans and specifications. On the 8th of April, 1915, the Oregon Engineering and Construction Company, desiring to sublet portions of the work to be done under the contract, entered into an agreement with plaintiff Guy L. Wallace wherein Wallace agreed to lay, lead, calk and test all of the pipe for the water supply of Oregon City, at the price of ten cents per lineal foot. There were approximately 131,250 feet. The contract between the defendant and the South Fork Water Commission contained the following clause:

"The contractor shall not assign or transfer his contract, or sublet any part of the work embraced in these specifications, without the written consent of the South Fork Water Commission, and the sureties on the contractor's bond."

The contract between the Oregon Engineering and Construction Company and the plaintiff contained the following clause:

"It is understood and agreed that the party of the first part shall swab all joints, retouch all abrasions to pipe caused by laying same to the satisfaction of the Engineer in charge; and that all work shall be done in accordance with the plans and specifications as outlined in the contract between the party of the second part and the South Fork Water Commission of the City of Oregon City, Oregon, which contract is hereby referred to and made a part of this agreement so far as appertaining hereto."

The plaintiff furnished defendant with the usual bond with surety for the performance of his contract. Thereafter Wallace entered into an agreement in writing with the Phelan Construction Company to perform all of the work in laying the pipe in accordance with the original contract at the rate of 6 cents per lineal foot, and furnished bond in the sum of five thousand ($5,000) dollars, guaranteeing the faithful performance of the contract. The work was to be done in a manner satisfactory to the engineer in charge, the general contractor and to plaintiff Wallace. The Phelan Construction Company, pursuant to the contract, made all necessary arrangements to perform the work. Afterward, plaintiff Wallace was informed by the Oregon Engineering and Construction Company that he would not be permitted to do the work; that he had no binding contract therefor, for the reason that his sub-

contract had not been assented to in writing by the South Fork Water Commission of Oregon City, Oregon. The plaintiff testified upon the trial that he had no knowledge of the clause in the original contract to the effect that the South Fork Water Commission should consent to the making of a subcontract for the work, and that he knew nothing about the same until May 13th of that year, after he had made the contract with the Phelan Construction Company to perform the work.

James J. Cayo, a member of the firm of the Phelan Construction Company, testified that immediately after making the contract to perform the work for Wallace, they got tools, furnaces, hammers, lanterns and arranged for testing-pumps; that they had the calking tools; that he had a talk with Mr. Moffatt. president of the Oregon Engineering and Construction Company, in which Mr. Moffatt said:

"I have let the contract to Moore and Wallace," but, he said, "I don't like this man Moore; I believe he is crooked. I like Wallace pretty well," and "I am going to try to break the contract; in fact I am going to break it. It may cost me three, four or probably five hundred dollars to break it, but I will break it and then give you (Cayo) the contract direct from us and pay you more money."

In talking with the plaintiff Wallace in regard to the matter, Mr. Moffatt said in effect, that Wallace had to guarantee the pipe, which was to be furnished by the original contractors for the work; that the engineer in charge of the work would insist that Copenhagen Brothers, who were to deliver the pipe, should have the laying of the upper five miles as on account of the topography of the country they would have to lay the pipe in the trench anyway.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Thomas Mannix* and *Mr. Grant B. Dimick,* with an oral argument by *Mr. Mannix.*

For respondent there was a brief over the names of *Mr. J. Dean Butler* and *Mr. Joseph E. Hedges,* with an oral argument by *Mr. Butler.*

BEAN, J.—1. It is assigned that the trial court erred in holding that the subcontract between Wallace and the Oregon Engineering and Construction Company did not go into effect on the day it was executed, by reason of the clause in the original contract providing that no part of the work should be sublet, and that Wallace could not sublet the work to the Phelan Construction Company without the consent of the South Fork Water Commission.

The plaintiff Wallace was bound only by the terms of his subcontract. He was not bound by the terms of the original contract except in so far as the original contract was incorporated into the subcontract. From that part of the subcontract above quoted, it appears that the original contract was referred to on account of the plans and specifications, for the purpose of providing the manner in which the work should be done.

A reference in a subcontract to the general contract for a particular purpose makes it a part of the subcontract only for the purpose specified. Therefore, the other terms and conditions of the original contract, between the contractor and the owner, do not affect the subcontract: *Guerini Stone Co.* v. *P. J. Carlin Construction Co.,* 240 U. S. 264 (60 L. Ed. 636, 36 Sup. Ct. Rep. 300); *Myers* v. *Joseph A. Strowbridge Estate Co.,* 82 Or. 29 (160 Pac. 135); 9 C. J., p. 710.

2–4. A provision in the original contract like the one in the present case, that the contractor shall not sublet the work without the written consent of the original contractee, is for the benefit of the latter and may be waived by him: 9 C. J., p. 910. The inhibition in the original contract between the South Fork Water Commission and the Oregon Engineering and Construction Company against assigning or subletting the work was personal to the latter. As between plaintiff Wallace, and the Oregon Engineering and Construction Company, the latter had a perfect right to sublet the work to plaintiff. Although this was a breach of the original contract between the Oregon Engineering and Construction Company and the South Fork Water Commission, the latter was not compelled to insist upon the inhibition, and might waive the same, and it in no way affected the right of the plaintiff to enter into a subcontract with the defendant. It was incumbent upon the Oregon Engineering and Construction Company to obtain the necessary consent to sublet the work, and make their contract good. This was not the duty of the plaintiff: *Lloyd* v. *Crispe,* 5 Taunt. 249 (128 Eng. Reprint, 685); *Canham* v. *Barry,* 15 C. B. 597 (139 Eng. Reprint, 558); *Robinson* v. *Harman,* 2 Keener's Selections on Contracts, p. 1121; *Burck* v. *Taylor,* 152 U. S. 634 (38 L. Ed. 578, 14 Sup. Ct. Rep. 696). It does not seem that defendant made any endeavor to obtain the consent of the South Fork Water Commission, but rather sought an excuse for avoiding its contract with plaintiff.

If A should employ B to cut 100 cords of wood upon a certain quarter-section of land at a certain price, which B agreed in writing to do, if it should transpire that A did not own the land or wood, and had no right

to cut the same, those facts would not relieve him from the obligation with B. So in the present case, whether under the original contract the Oregon Engineering and Construction Company had a right to sublet the work or not, the making of the subcontract with the plaintiff Wallace rendered the Oregon Engineering and Construction Company liable. The parties to this case put their contract in writing. It is presumed that all of the terms of the contract are embraced therein; that the extent and the manner of their undertaking are delineated by the written memorandum. All oral negotiations or stipulations between the parties preceding or accompanying the execution of the written instrument are regarded as merged therein: *Tallmadge* v. *Hooper,* 37 Or. 503, 512 (61 Pac. 349, 1127). If the defendant had desired that the efficacy of its contract with the plaintiff should depend upon obtaining the consent of the South Fork Water Commission thereto, it should have so stipulated in the contract.

It does not, however, appear from the evidence that there was any real objection upon the part of the Water Commission to the work being performed by plaintiff Wallace and Phelan Construction Company with whom he had made satisfactory arrangements. The evidence stands uncontradicted to the effect that the Oregon Engineering and Construction Company desired some excuse for not carrying out its contract with plaintiff, because he had made arrangements to have the work done at a profit of 4 cents per lineal foot of pipe.

5. The following paragraph is contained in the contract between the Water Commission and the defendant:

"In order to prevent disputes and litigation, the Engineer shall in all cases by the referee to determine the amount, quality, acceptability and fitness of the several kinds of work and material which are to be paid for under these specifications, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of the contractor, and his decisions and determinations shall be final and conclusive."

It is contended by counsel for defendant that the engineer in charge of the work had authority to settle all disputes arising in regard to the fulfillment of the contract. This provision in the original contract pertains to questions that might arise in the execution of the work pursuant to the agreement. It does not give the engineer authority to decide whether or not the contract executed by plaintiff and defendant is a valid one, or oust the jurisdiction of the courts to try an action of damages for a breach of the contract. Such was not the purpose or intention of the stipulation in the original contract: *Lauman* v. *Young*, 31 Pa. St. 306. It was error to grant the motion for a nonsuit, and therefore the judgment of the lower court is reversed, and the cause will be remanded for such further proceedings as may be deemed proper, not inconsistent herewith. REVERSED AND REMANDED.

McBRIDE, C. J., and MOORE and JOHNS, JJ., concur.

Rehearing denied October 15, 1918.

ON MOTION FOR REHEARING.

(175 Pac. 445.)

Department 2.

Mr. Thomas Mannix and *Mr. Grant B. Dimick,* for the petition.

Mr. J. Dean Butler and *Mr. Joseph E. Hedges, contra.*

PER CURIAM.—6. In the former opinion by Mr. Justice BEAN (174 Pac. 156), it was held to be error for the lower court to sustain defendant's motion for nonsuit (against the plaintiff) and the case was reversed and remanded for new trial. The appellant filed a petition for rehearing in which he contends that this court should render him a judgment against the respondent for the amount of his claim. It appears from the record that under his contract the plaintiff was to receive ten cents for each lineal foot of pipe; that he sublet the contract at six cents per lineal foot, or a profit of four cents for each foot of pipe. His cause of action is to recover the amount of the difference between his original contract and the subcontract. Such fact appears upon the face of the record and is undisputed.

Appellant's counsel has cited respectable authorities from other jurisdictions, sustaining his position, but with one or two exceptions, where a nonsuit has been granted by the lower court and the case has been reversed in this court, it has been the practice to remand the case for a new trial. It appears upon the

face of the record before this court that the appellant is now entitled to a judgment against the defendant for the difference between the original contract price and the price at which the contract was sublet, or four cents per lineal foot, yet under the issues made by the pleadings defendant might tender and produce at a second trial in the lower court testimony which might contradict the *prima facie* case made by plaintiff, and in the interests of justice and to give it such right, we are of the opinion that the case should be remanded.

OVERRULED.

Argued September 19, reversed with directions October 15, 1918.

ASHLEY & RUMELIN *v.* CITY OF PORTLAND.

(175 Pac. 447.)

Setoff and Counterclaim—Against Assigned Cause of Action.

1. Plaintiff corporation, which secured assignment of sums due assignor under his contract with defendant city for hauling wood, was in no better position than assignor, and defendant could counterclaim for sums collected for the city by assignor for wood sold by him, although defendant had exacted a bond from him in view of section 28, L. O. L.

[As to scope and office of counterclaim under the Code, see note in 89 **Am. Dec.** 482.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The substance of the complaint is that one Hart had a contract with the defendant city for hauling wood, upon which there became due to him in various sums during the month of March, 1916, the aggregate sum of $1,465, which chose in action he had assigned to the plaintiff upon which the city has paid $968, leaving a balance due in the sum of $497; also, that under the same contract during the month of April of that year

Hart had earned $735, no part of which has been paid, and that Hart also assigned that claim to the plaintiff.

After sundry denials, the city alleges that Hart earned during the month of March various amounts aggregating $1,599.97, all of which it had paid to the plaintiff as his assignee; that during April he earned $187.30, which was paid to the plaintiff, and besides that, $735.90, but that prior to that month Hart had become and then was indebted to the defendant for money which he had collected for the city and had not paid, and for wood belonging to the city which he had converted to his own use, all in the sum of $779.52; and, lastly, that the New Amsterdam Casualty Company as surety for Hart upon the bond which he executed and delivered to the defendant conditioned for a faithful performance of the contract, assumed the performance thereof on Hart's failure, and thereafter completed it with his consent, being thereby subrogated to his rights and assuming all his liabilities, and that the defendant has settled with the Surety Company for all matters, obligations and rights arising under the contract.

The new matter of the answer is denied by the reply, except that the plaintiff charges that some of the payments which the defendant applies to the March earnings were really for February services of Hart.

The court made findings of fact to the purport that during March and April Hart had earned under the contract $2,041.16, all of which had been paid by the city to the plaintiff as his assignee, except $735.90, for which as a conclusion of law the court found that the plaintiff was entitled to judgment against the defendant. Contending that there is no evidence to justify this result, the defendant appeals.

REVERSED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, *Mr. Lyman E. Latourette,* Deputy City Attorney, and *Mr. Stanley Myers,* Deputy City Attorney, with an oral argument by *Mr. Latourette.*

For respondent there was a brief and an oral argument by *Mr. Walter S. Hufford.*

BURNETT, J.—1. Without dispute, the testimony discloses that Hart assigned to the plaintiff all his March earnings, amounting to $1,613.97, and that the city paid to the plaintiff that sum of money. It is uncontroverted, also, that during the month of April he earned $187.30, which the city paid to the plaintiff. Afterwards during that month he earned a total of $735.90 under the contract. Prior to that time he had become indebted to the city in various sums for overpayment, retained collections and wood he had disposed of, aggregating $779.52, all of which occurred before he earned anything during the month of April.

It appears in evidence, also, that the New Amsterdam Casualty Company was surety on the bond Hart had given to the city and that on his financial collapse and abandonment of the contract the Surety Company took it up and completed it. With these facts appearing before it in the evidence without dispute, the Circuit Court seems to have adopted the theory that inasmuch as the city had exacted a bond from Hart it should look to its security without claiming any offset against what he had earned and assigned to the plaintiff; and so, notwithstanding the fact that there was more due from Hart to the city than from the city to him, the Circuit Court entered judgment against

the city for his side of the account assigned to the plaintiff.

"In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any setoff or other defense existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due": L. O. L. 28.

This is but the codification of a very familiar principle, that the transfer of a demand upon an open account is without prejudice to any counterclaim or setoff existing at the time in favor of the person against whom the assigned demand has accrued. The assignment of Hart's claim against the city did not put the plaintiff in any position more favorable than that of Hart himself. Hence the plaintiff took its claim under the assignment without prejudice to the right of the city to counterclaim against it for the full amount of Hart's indebtedness to it arising out of the transaction involved in the contract.

Although secured by the bond of the Surety Company, the city would not have been safe in paying the amount either to Hart or to his assignee. It would have depleted the fund to which the Surety Company was entitled in subrogation on assuming the performance of the contract, and would have operated to release the surety. It is analogous to the situation portrayed in the case of *Derby* v. *United States Fidelity & Guaranty Co.*, 87 Or. 34 (169 Pac. 500), to the effect that a contractor on a public work requiring a bond for the faithful performance of the contract, cannot assign his earnings under the agreement in such a manner as to prevent the surety from becoming subrogated to his rights and to the fund accruing when it

undertakes to carry out the stipulation despite his default and failure: See, also, *Labbe* v. *Bernard,* 196 Mass. 551 (82 N. E. 688, 14 L. R. A. (N. S.) 457, and note).

The cases cited by the plaintiff, such as *McDaniel* v. *Maxwell,* 21 Or. 202 (27 Pac. 952, 28 Am. St. Rep. 740); *Willard* v. *Bullen,* 41 Or. 25 (67 Pac. 924, 68 Pac. 422); *Wakefield, Fries & Co.* v. *Parkhurst,* 84 Or. 483 (165 Pac. 578), to the effect that the assignment of such a claim or any part thereof is good in equity as a transfer *pro tanto,* are not applicable here, for in all of them the person from whom the money was primarily due had no offset or counterclaim against the payment and was practically but a stakeholder, indifferent between the several claimants.

It would not be common justice to compel the city to pay the claim of the contractor who has embezzled its funds to a greater amount than he had earned. The plaintiff is in no better plight by reason of its assignment. No proper conception of the undisputed testimony in the case would justify the conclusion embodied in the judgment of the Circuit Court. It is therefore reversed and the cause remanded with directions to enter judgment for the defendant.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued September 18, reversed and remanded October 15, 1918.

McCABE v. KELLEHER.*

(175 Pac. 608.)

Fraud—Waiver—Performance After Discovery of Fraud.

1. Where one who has been induced through fraud to enter into contract discovers the fraud while contract is wholly executory, he waives the fraud by wholly or partly performing the contract.

Fraud—Part Performance of Contract—Waiver.

2. But he does not waive the fraud by partly performing the contract before discovering the fraud.

Fraud—Election of Remedies.

3. A person who has been induced through fraud to enter into contract and partly performs his part of contract before discovering fraud may keep what he has acquired by the contract and sue for damages, or may rescind contract absolutely and sue in action at law to recover consideration, or may sue in equity to rescind contract and obtain full relief in such action.

Fraud—Actions—Rescissions of Contract.

4. Where a person who has been induced to enter into a contract through fraud, elects to retain what he has received and bring an action at law to recover the damages sustained, he is not required to rescind the contract.

Vendor and Purchaser—Rescission—Fraud—Payments With Knowledge of Fraud.

5. Payments of purchase-money installments with knowledge of the fraud inducing the contract of purchase amount to ratification defeating complete rescission.

Fraud—Action for Damages.

6. Grantees who were induced through fraud to purchase property, instead of rescinding transaction upon discovery of fraud, could keep the property and sue for damages.

Vendor and Purchaser — Sale of Land — Payment With Notice of Fraud—Estoppel.

7. Where grantees who were induced through fraud to purchase property made payments upon notes given grantor after discovery of fraud, estoppel did not result, where such payments did not cause grantor to change his position to his injury.

Fraud—Payments With Notice of Fraud—Waiver.

8. Grantees who purchased property because of fraudulent representations did not, by making payments on notes given for part of

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*The question of waiver of fraud by completing executory contract for sale of personal property after discovering the fraud is discussed in note in **8 L. R. A. (N. S.) 452.** REPORTER.

purchase price after discovery of fraud, waive their right to sue grantor for damages.

Fraud — Conveyance — Evidence — Payments Made With Notice of Fraud.

9. In grantees' action against grantor for damages for fraudulent representations, evidence of payments on notes made by grantees after discovery of fraud may have some value on question of whether grantees were really deceived, or whether their grievance is a mere afterthought growing out of dissatisfaction.

Fraud—Misrepresentation—Opinions—Dealer's Talk.

10. Representations as to value of land and assertions in commendation of land commonly called "dealer's talk" are mere expressions of opinion and not actionable fraud.

[As to representations by vendor in respect to value of property, see notes in 15 **Am. Rep.** 382; 18 **Am. St. Rep.** 556.]

Trial—Contradictory Instructions.

11. Where the court charged that where vendees had lived on the land two months before taking deed or paying money, having opportunity to ascertain the nature of the soil, etc., they were bound to protect themselves from any fraud of vendor, a further instruction that defendant could not rely on such rule, if he made the fraudulent statements alleged, was contradictory, and ground for reversal.

Appeal and Error—Harmless Error—Conflicting Instructions.

12. Conflicting instructions are ground for reversal, because tending to confuse the jury.

From Douglas: JAMES W. HAMILTON, Judge.

Department 1.

The plaintiffs bought from the defendant an undivided half of 253 acres of land in Douglas County, paying part cash and giving their notes and mortgage on the land for the balance of the price. They have brought this action to recover damages from the defendant on account of alleged fraud on his part inducing them to purchase. They claim that they were ignorant of land values in the State of Oregon and were without any knowledge or experience concerning the nature of the soil and the value of land in Douglas County, all of which was well known to the defendant. The fraudulent representations complained of are thus narrated in the complaint:

"That in order to induce the plaintiffs to purchase an undivided one-half interest in and to the above-described real property, the defendant on or about the 14th day of October, 1914, stated and represented to the plaintiffs that there were one hundred and sixty acres of plow land in said tract upon which he could raise two tons of hay per acre, which would net him at least eight dollars per ton; that he, the defendant, had cleared from one to two thousand dollars per year from said above-described real property; that there was good pasturage for ten months in the year on that part of said land adapted exclusively to pasturage and that the said above-described land was worth the sum of seventy-five dollars per acre; that it was the finest land out of doors and would grow everything."

The alleged falsity of these statements is pointed out in detail in subsequent averments, as well as the defendant's knowledge that they were untrue, and it is stated that the plaintiffs relied upon them and were thereby induced to purchase the land.

The charges of fraud are traversed by the answer. Further pleading, the defendant gives a history of the transaction from his viewpoint and says that the plaintiff C. J. McCabe sought him with a view of purchasing the land and had ample opportunity to learn completely its condition, area of plow land, and all other matters giving rise to the grievance of the plaintiffs, prior to entering into the contract; that they resided on the premises from August 24, 1914, to October 14th of the same year, at which latter date they took the deed, paying part of the purchase price and giving the notes and mortgage mentioned. A second further and separate answer is to the effect that the defendant sold to the plaintiffs an undivided half interest in the property and leased to them the other moiety for five years, all for the consideration of $9,487.50 and the payment of the taxes on the leased portion; and

that they paid to him on account thereof $3,507.50 and "delivered their promissory notes secured by a mortgage on said real property for the remainder of the purchase price." The pleading goes on to say in substance that ever since October 14, 1914, the plaintiffs have been in possession of the property, knew all about it and its productivity and with full knowledge of all the circumstances connected with the transaction have continued to make payments on account of principal and interest of the note, whereby they "waived all claim for damages, if any they ever had, and are estopped from asserting that the contract was induced by fraud or misrepresentation." The Circuit Court sustained a general demurrer to this second further and separate answer and the defendant complains of this ruling on appeal. The remainder of the new matter in the answer was traversed by the reply in material particulars. The defendant also assigns as error the refusal of the court to give the following instructions:

"I further instruct you that the expression of an opinion is not a representation and does not amount to a fraud, although false. So, if the purchasers had an opportunity to examine the property and ascertain its value, and no fiduciary relationship existed between them and the defendant, the defendant's representation as to the value of the property, if any he made, is but the expression of an opinion and not actionable, even though false and fraudulent.

"I further instruct you that general assertions or expressions of a seller in commendation of his land and bragging upon it, commonly called 'Dealers' Talk,' do not constitute any ground for an action of deceit or fraud; such statements are generally regarded in the law as mere expressions of opinion, upon which a purchaser cannot safely rely."

He contends likewise that the court was wrong in giving an instruction numbered 9, which after recital of the charge of fraud as made in the complaint, continues with this statement:

"Now, if you find from the evidence that the defendant made such representations to the plaintiff and said representations were false, and that plaintiffs believed them to be true and relied upon them and were induced thereby to purchase said premises to their injury, and defendant knew them to be false and plaintiff was thereby induced to forbear from inquiry, the plaintiffs would be entitled to recover some damages; but first it would be necessary for you to determine what damages the plaintiffs should recover."

The defendant also complains of instruction number 10:

"I also instruct you that if you find that the representations alleged in plaintiffs' complaint were made, and that they were false, and that the defendant knew them to be false, and that the defendant made them recklessly without knowledge of the truth or falsity of such representations, and that the plaintiffs relied upon such representations to their injury, as I have already instructed you, he will not be heard to say that the plaintiffs were guilty of such negligence to preclude them from recovering compensation for such injuries as were inflicted upon them under cover of such falsehoods, if such false statements were actually made."

The court gave instruction number 11, as follows:

"I further instruct you, gentlemen, as follows: That the law imposes upon one purchasing property the duty to exercise due diligence to protect himself from fraud. By due diligence is meant such diligence as ordinarily prudent men would use; and if you find from the testimony in this case that no confidential relation existed between the parties, that the premises, the subject of the purchase and sale, was shown the

plaintiffs and was open to their inspection, and no deceit or artifice was practiced upon them by the defendant to prevent a full examination of and independent inquiry concerning the same, and plaintiffs failed to make such examination and inquiry, then they would have been negligent and not entitled to recover any damage."

No complaint is made of this part of the charge.

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Rice & Orcutt,* with an oral argument by *Mr. Dexter Rice.*

For respondents there was a brief over the names of *Mr. Oliver P. Coshow* and *Messrs. Neuner & Wimberly,* with an oral argument by *Mr. Coshow.*

BURNETT, J.—According to 39 Cyc. 1997, quoted with approval in *Kruse* v. *Bush,* 85 Or. 394 (167 Pac. 308):

"One who has been induced by fraudulent representations to become the purchaser of property has, upon the discovery of the fraud, three remedies open to him, either of which he may elect: He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; he may bring an action in equity to rescind the contract and in that action have full relief; lastly, he may retain what he has received and bring an action at law to recover the damages sustained."

In the instant case the plaintiffs have adopted the third remedy mentioned by the text-writer. In *Kruse* v. *Bush* the plaintiff had entered into an executory contract to buy some land and had paid part of the purchase price, after which she discovered that she had been defrauded by the vendor. Although she had

not paid in full for the property, she was sustained in her rescission of the contract and her action to recover what she had paid, because she had promptly tendered to the vendor a reconveyance of the tract and had demanded the return of what she had paid.

1–5. It is also a principle of law that if while a contract is yet wholly executory the fraud inducing it is ascertained by a party to it, he waives the deceit if he performs his portion, either wholly or partly. But the rule is otherwise if he does not discover the cheat until he has partly performed: *McDonough* v. *Williams,* 77 Ark. 261 (92 S. W. 783, 8 Ann. Cas. 452). The reason of this doctrine is that while the contract remains wholly executory upon both sides, the matter is yet at large, so that if with knowledge of the fraud either party goes forward in performance of the stipulation, he does so with his eyes open, and the damage resulting, if any, would be in a sense self-inflicted. A different situation is apparent when he innocently enters upon performance and accomplishes part of his covenants. He is then in the condition where he is entitled to keep what he has acquired by the contract and sue for damages, although he may have his election to take either of the other remedies mentioned. In the first case put by Cyc. a rescission is necessary; in the third, none is required. As against a subsequent attempt at utter rescission and recovery of what has been paid on the purchase price, payment of installments of the money agreed to be paid, with knowledge of the fraud, will amount to such a ratification as will defeat complete rescission. The reason is that one wishing to break up the contract entirely must act promptly on the discovery that he has been deceived, and he is not allowed to speculate on whether some advance in values, or the like, will not

save him from loss: *Bell* v. *Keepers,* 39 Kan. 105 (17 Pac. 785). The principle is not controlling where the injured party elects to keep the property and sue for damages alone. In the present litigation the plaintiffs had purchased the property, had acquired the title in fee simple by the conveyance from the defendant and, according to his pleading, they had "delivered their promissory notes secured by a mortgage on said real property for the remainder of the purchase price." In other words, they had promised absolutely and at all events to pay the money, and the defendant had accepted this engagement in lieu of such payment. In a sense, the transaction was closed, and while it might have been utterly rescinded by a reconveyance of the land and a demand for the return of the payments and for the cancellation of the notes and mortgage, if they were still in the control of the defendant, yet the plaintiffs were not compelled to adopt that course.

6, 7. It is said, however, in the answer to which the court sustained a demurrer, that the plaintiffs waived their claim for damages on account of having continued to pay after they discovered the fraud. The conclusion of waiver does not necessarily follow from the facts stated in the defense tendered. It is not averred therein that the plaintiffs intended to forego the right the law gave them to keep the property and sue for damages. Neither does an estoppel result, because it is not shown that the defendant was induced to change his position to his hurt on account of the payments made by the plaintiffs.

"The question of waiver is mainly a question of intention which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner and to operate as such it must in all cases be in-

tentional. There can be no waiver unless so intended by one party and so understood by the other or one party has so acted as to mislead the other and is estopped thereby. Since intention is an operation of the mind, it should be proven and found as a fact, and is rarely to be inferred as a matter of law": 40 Cyc. 261.

8, 9. The facts stated in the defense under consideration do not show any intention on the part of the plaintiffs to relinquish their right to keep the land and sue for damages on account of its not conforming to the representations of the defendant. The matter alleged may have some value as evidence on the question as to whether the plaintiffs were really deceived or whether their grievance is a mere afterthought growing out of dissatisfaction, but there was no error in sustaining the demurrer to it as a pleading.

10. The instructions requested by the defendant should have been given. The tenth instruction given was faulty in saying in substance that the defendant would be precluded from averring that the plaintiffs were negligent merely because he had made fraudulent statements. The rule is thus tersely laid down by Mr. Justice Bean in *Reimers* v. *Brennan,* 84 Or. 53 (164 Pac. 552):

"A purchaser must use reasonable care for his own protection and should not rely blindly upon statements made by a seller; and between parties dealing at arm's-length where no fiduciary relation exists and no device or artifice is used to prevent an investigation, it is the general rule that a purchaser must make use of his means of knowledge, and failing to do so, he cannot recover on the ground that he was misled by the seller: 30 Cyc. 49; *Allen* v. *McNeelan,* 79 Or. 606 (156 Pac. 274); *Poland* v. *Brownell,* 131 Mass. 138 (40 Am. Rep. 215). Where there has been an inspection by a person making an exchange of property, false rep-

resentations as to the value cannot as a rule be made the basis of an action for damages." (Citing authorities.)

Where no fiduciary relation exists between the contracting parties and each is *sui juris* dealing at arm's-length with the other, each is required to use diligence in a reasonable degree to protect his own interest. Neither is held to be the guardian or protector of the other. Neither can inertly shut his eyes to what is manifest to a person of ordinary intelligence. In order to excuse him from reasonable care of his own interest in respect to the subject matter of the contract which is plainly before his observation, there must be some effort on the part of the other party or some condition tending to forestall or prevent investigation. In the precedents cited by the plaintiffs on this point there is usually found some element or circumstance whereby the injured party was deprived of an opportunity to examine for himself and hence, in some degree at least, was compelled to rely upon the misleading statements of the person with whom he dealt. For instance, *Steen* v. *Weisten,* 51 Or. 473 (94 Pac. 834), was a case where the timber-land in question was in a distant part of the state and the plaintiff had no opportunity to see it before buying. In *Boelk* v. *Nolan,* 56 Or. 229 (107 Pac. 689), the half truths about the state of the plaintiff's title to land in Oregon which the defendant sought to acquire were uttered in California where the plaintiff had no opportunity to examine the record or to consult anyone else who knew the facts. *Jeffreys* v. *Weekly,* 81 Or. 140 (158 Pac. 522, Ann. Cas. 1918D, 690), involved a tract of land of such irregular shape that its area could not be estimated with any degree of accuracy, so that under the circumstances of the case the buyer was compelled to rely on the seller's

statement. No such situation is presented here where the plaintiff husband is a civil engineer, confessedly competent to survey the tract with precision and, as he states, could have stepped it and thus ascertained with close approximation how much it contained.

Instructions 10 and 11 were contradictory of each other. In the former, the court eliminated the duty of the purchasers to take reasonable care of their own interest, and in the latter he inculcated it as a precept governing their conduct. The principle that where the parties are dealing on even terms it is the duty of each to exercise reasonable diligence in guarding his own interest is illustrated in *Reimers* v. *Brennan,* 84 Or. 53 (164 Pac. 552), and *Allen* v. *McNeelan,* 79 Or. 606 (156 Pac. 274). The doctrine that in order to excuse either party from thus protecting himself there must be some artifice practiced by the other to thwart investigation, is set out in *Aitken* v. *Bjerkvig,* 77 Or. 397 (150 Pac. 278).

11, 12. It is admitted that the plaintiffs resided on the land almost two months before paying any money or taking the deed, and that they had an opportunity to ascertain the area of plow land, the nature of the soil and most other things the falsity of which they charge against the defendant. Under these circumstances the defendant was entitled to an instruction covering the duty of the plaintiffs to look out for themselves and the court was wrong when it said in one part of the charge that the defendant could not rely upon this rule if he made the fraudulent statements attributed to him, while later in its directions to the jury the court taught the doctrine of the plaintiffs' duty in the respect mentioned. Contradictory instructions have often been held ground for reversal, because they tend to confuse the jury: *Neis* v. *Whit-*

aker, 47 Or. 517 (84 Pac. 699). For this reason also the judgment is reversed and the cause remanded for further proceedings. REVERSED AND REMANDED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued October 9, affirmed October 15, 1913.

STATE *v.* KAPSALES.

(175 Pac. 433.)

Criminal Law—Evidence—Corroboration of Accomplice—Sodomy.

1. The objection that corroboration of the prosecuting witness in a sodomy case is necessary on the accomplice theory is untenable, where the jury found such witness resisted the commission of the act.

[As to convicting on testimony of accomplice, see notes in 71 Am. Dec. 671; 34 Am. Rep. 408; 98 Am. St. Rep. 158.]

Criminal Law—Review—Jury as Sole Judge of Facts.

2. The jury is the sole judge of the facts in a sodomy prosecution, and a conviction will not be disturbed, where the record discloses evidence sufficient for submission to the jury.

Criminal Law—Review—Misconduct of Counsel—Favorable Ruling.

3. Appellant, convicted of crime, cannot complain of a ruling of court stopping alleged improper remarks of the district attorney.

Criminal Law—Objection—Remarks of Counsel.

4. Where no objection was made nor ruling had on alleged improper remarks of counsel, the appellate court cannot review the matter.

Criminal Law—New Trial—Motion—Sufficiency.

5. A motion for new trial for misconduct of the district attorney and supporting affidavit *held* to be conclusions drawn from the evidence, and not the evidence nor facts called for by Section 177, L. O. L., when made on grounds provided for in Section 174, subdivisions 1, 2, 3, or subdivision 4.

From Columbia: JAMES A. EAKIN, Judge.

The defendant was convicted of the crime of sodomy, sentenced to serve from one to fifteen years in the penitentiary, and appeals. Affirmed.

For appellant there was a brief over the names of *Mr. Senaca Fouts* and *Mr. Alex Sweek,* with an oral argument by *Mr. Fouts.*

For the State there was a brief and an oral argument by *Mr. G. R. Metsker,* District Attorney.

OLSON, J.—Defendant bases his appeal on four points. (1) Proof of emission is necessary. (2) Corroboration is necessary, other than the testimony of the person upon whom the crime charged was committed. (3) The evidence was not generally sufficient to sustain a conviction, and (4) the district attorney was guilty of improper conduct in his speech to the jury, sufficient to entitle appellant to a reversal.

The first point was waived by counsel in argument, as it is statutory law in this state that no such proof is required.

1. As to the second point, our statute requires and all juries are charged, as in this case, that they are not bound to find in accordance with the testimony of any number of witnesses that does not satisfy their minds as against a lesser number. The requirement of corroboration is statutory or constitutional, as in the case of treason, custom, or adultery. The only question that could arise here on this point was as to whether the subject of this crime was an accomplice. The trial court, by an appropriate instruction, submitted to the jury the question as to whether the person complaining of the criminal attack was an accomplice, and, further, that if the jury found from the evidence that he was an accomplice, corroboration of the testimony of the complaining witness must be found before appellant could be convicted. The complaining witness testified that he resisted the commis-

sion of the act, and the jury having found on this point by their verdict this court will not pursue the subject further.

2. As to the third point the jury is the sole judge of the facts. The record discloses sufficient evidence to go to the jury.

3, 4. The fourth point involves the alleged misconduct of the district attorney in making improper remarks in his address to the jury. He made some reference to Greeks "bootlegging," and counsel for appellant objected. The trial court sustained the objections and the district attorney dropped the subject. There is no error in this. The court held with appellant, and surely no error can be predicated on a ruling of the court stopping alleged improper remarks. Later the district attorney said, "A man who will do this once will do it twice." This would seem to be merely argumentative, and in answer to argument of appellant's attorney, who had argued that the time testified to by witnesses would not have been sufficient for the commission of the offense. The district attorney argued that appellant had probably acquired facility by doing it before, and it would seem to be merely argumentative and not a stating of a fact that the crime had been actually committed by appellant before. The district attorney further referred to glories of past Greece and her present condition, and inferred that a decline in morals was responsible therefor, and this is complained of as prejudicial. The record, however, discloses that no exception to these remarks was made by counsel for appellant, and necessarily no ruling was had. This court cannot pass upon error of the lower court where no objection was made and no ruling had: *State* v. *Young,* 52 Or.

227 (96 Pac. 1067, 18 L. R. A. (N. S.) 688); *State* v. *Anderson*, 10 Or. 448.

5. Upon instructing the jury the court cautioned the jury against statements of counsel not supported by the testimony, and told them to disregard such statements; and further instructed the jury that race or lack of being a citizen of this country should not affect their verdict. Counsel for appellant offered no requests for instructions and did not except to the instructions given. Thereafter appellant's counsel filed a motion for a new trial on the ground that *inter alia* "irregularity in the proceedings of the State of Oregon, in this: that the district attorney for said county in his argument to the jury during the trial of the said cause, stated that it was his opinion that the defendant was guilty and should be convicted," and annexed an affidavit containing practically the same words. This motion was overruled and defendant contends that this is error. Section 177, L. O. L., provides:

"In all cases of motion for a new trial, the grounds thereof shall be plainly specified, and no cause of new trial not so stated, shall be considered or regarded by the court. When the motion is made for a cause mentioned in subdivisions 1, 2, 3, or 4 of Section 174, it shall be upon affidavit, setting forth the facts upon which such motion is based."

An examination of the evidence shows that both motion and affidavit are conclusions drawn from the evidence and not the evidence itself, nor the facts called for by the statute. The particular remarks of the district attorney complained of on appeal are not specified in the motion, or the affidavit supporting the same. The motion and affidavit are not a compliance with Sections 174 and 177, L. O. L., and the

motion was properly overruled. This court has already held that misconduct of counsel in remarks to the jury not excepted to and upon which the court makes no ruling, is an irregularity and must be presented under Sections 174 and 177, L. O. L., in order to be available on appeal.

The decree of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued September 26, affirmed October 22, 1918.

STATE v. MORRIS.*

(175 Pac. 668.)

Witnesses—Diagrams of Brands—Use.

1. In a prosecution for larceny of a horse, diagrams resembling the brands on the horse were admissible to illustrate the testimony of the witnesses.

Witnesses—Diagrams of Brands—Relevancy.

2. That a horse alleged to have been stolen was exhibited to the jury in order to understand testimony given did not make irrelevant diagrams of brands on the horse used for the same purpose.

Criminal Law—Evidence—Diagram of Brand.

3. Admission of diagram of brand on a horse, alleged to have been stolen, drawn by the witness, was not error despite a statement by the witness that he did not know whether he could make the "sketch as crooked as the original brand."

Larceny—Evidence—Ownership.

4. In a prosecution for larceny of a horse, a chattel mortgage given by a witness for the purchase price of horses, not including the one in question, *held* irrelevant on the question of ownership of the horse stolen.

Larceny—Evidence—Ownership.

5. In a prosecution for larceny of a horse, defendant could not prove ownership of the animal by showing that he had mortgaged it or that he had been sued by an outside party for its possession.

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*On brand as evidence of ownership of cattle, see note in 11 **L. R. A. (N. S.) 87.**

REPORTER.

Witnesses—Evidence—Interest of Witness.

6. In a prosecution for larceny of a horse, evidence that defendant's witness traveled 100 miles without a subpoena to attend the grand jury investigation of the crime, and voluntarily appeared before that body, was admissible as showing the interest of the witness.

Animals—Evidence of Ownership—Brand.

7. A brand is admissible in a prosecution for larceny of a horse to show previous ownership, although not recorded as required by Laws of 1915, Chapter 33, Section 8.

[As to brands on animals as evidence of ownership, see note in **Ann. Cas.** 1913E, 133.]

Criminal Law—Evidence of Other Offenses—System.

8. In a prosecution for the larceny of a horse, evidence that, about the time of the theft, other animals owned by other parties were also found in his possession or claimed by him, was admissible as showing a system of crimes.

Criminal Law—Best Evidence—Change of Brand.

9. In a prosecution for the larceny of a horse, it was not error to refuse to receive in evidence the contents of a letter claimed by defendant to have been received from the state veterinarian authorizing him to change his brand, such change of brand being provable as a public record.

Criminal Law—Instructions—Form and Defect.

10. In a prosecution for the larceny of a horse, an instruction as to the purpose for which evidence of brands was admitted *held* correctly refused as requiring a declaration of legal effect of the evidence and as emphasizing evidence.

From Crook: T. E. J. DUFFY, Judge.

Department 2.

The defendant was indicted for, tried and convicted of the crime of larceny of a gelding, which crime was charged to have been committed on the fifteenth day of February, 1915, in Crook County, Oregon. The defendant appeals to this court alleging certain errors, which will be discussed in the opinion. AFFIRMED.

For appellant there was a brief over the names of *Mr. N. G. Wallace* and *Mr. Vernon A. Forbes,* with an oral argument by *Mr. Wallace.*

For the State there was a brief over the names of *Mr. George M. Brown,* Attorney General, *Mr. Willard*

H. Wirtz, District Attorney, and *Mr. Jay H. Upton,* with an oral argument by *Mr. Brown.*

McBRIDE, C. J.—In order to properly understand the contentions it will be necessary to state briefly the theories of the state and the defendant. The state's theory was, that the animal in question was the property of Paul Held, an extensive stock owner in Crook County, and that the defendant had converted it to his own use, and for the purpose of creating false *indicia* of his ownership had made over and altered the brand of Paul Held upon the animal so it resembled his own. The following facts appeared in the testimony:

When defendant first began to run horses upon the range he adopted a brand, or device, known as a clover leaf or club, which resembles the club on a playing card and appears, as nearly as the writer is able to portray it, as follows: This brand was first burned indiscriminately on any part of the animal, but when the branding law of 1915 was passed defendant made application for its use on both jaws only. In the same vicinity one W. W. Brown had for several years used what is called a "Bar Horseshoe" brand, which resembles the following sketch: , and Paul Held, another stockman in the vicinity and the claimant of the horse in controversy, used what is called the "Rocker P" brand, which resembles the following sketch: In 1915 the defendant obtained permission from the state veterinarian to use the club brand with the addition of a quarter circle beneath, giving it somewhat this appearance: It was claimed by the state that defendant had changed the brand of Held upon the animal in question from a "Rocker P" to his club brand

by burning the same over as follows, the dotted lines showing the alleged alterations: , and there was evidence tending to show that such alterations had been made. The defendant claimed the animal as his own so there is no question as to his possession of it, the sole matter in dispute being as to whether or not such possession was a guilty one.

1, 2. In the course of the trial several witnesses testified as to the brands upon the animal in question. At the request of the district attorney diagrams were drawn purporting to resemble the brands, which were received in evidence over defendant's objection, the ruling of the court being assigned as error. We see no reason why these diagrams should have been excluded. They stand upon the same footing as maps and plats. Diagrams drawn to illustrate the testimony of a witness, however crude, are constantly admitted and used. The fact that the animal in controversy was exhibited to the jury did not destroy the relevancy of the diagram. The horse was not offered as testimony, nor made an exhibit in the case, nor sent up with the record on appeal. The jury were merely permitted to examine the animal for the purpose, as the court informed them, of enabling them to understand the testimony. The authorities substantially agree that such view is not in itself substantive evidence. There was no error in the ruling of the court.

3. Error is also predicated upon the ruling of the court permitting the prosecution to ask E. B. Wade, a witness for the defendant, to make a diagram of the brand upon the horse in controversy, and allowing the diagram so made by the witness to be admitted in evidence. The question arose in the following manner:

Counsel for the state, while cross-examining the witness, said:

"Now I am going to ask you to make a diagram of the brand that is on this horse."

Mr. Wallace, counsel for defense:

"We object to that as being incompetent, irrelevant and immaterial, and for the further reason that it is not proper cross-examination because the witness did not attempt to go into any description of the brand at all, absolutely none."

Mr. Wirtz: "He was present when this brand was put on and he has examined the horse he says, and ought to be able to make the brand that is on the horse."

Mr. Upton: "And he described, your Honor, how the brand was put on with the iron."

The Court: "You may cross-examine on that," to which ruling defendant excepted.

Mr. Wirtz: "Will you make a diagram of the brand on the horse jaw?"

Witness: "I will try. I don't know whether I can make it as crooked as that one is."

Witness made a diagram of the brands upon the animal, which, though they would not take a prize in the Academy of Fine Arts, compare favorably with the other sketches introduced in evidence. We do not think the modesty of the witness in saying that he did not know he could make the clover leaf sketch as crooked as the original brand, detracted from the value of his sketch, especially when viewed in connection with his testimony and the other sketches submitted.

4. Witness Wade testified among other matters, that in 1909, he bought a band of horses from one Ed De Lore, which were branded with a trowel brand, one of the horses being a mare and the mother of the horse in controversy; that when the colt was little he put the trowel brand on it because its mother was so

branded; that the animal in question was about three years and one month old at the time of the trial (March 11, 1918); that he did not pay cash for the horses but gave De Lore a mortgage for the purchase price, whereupon the mortgage was offered in evidence and upon objection of the state was excluded. The chattel mortgage was given in 1909 and did not include the horse in question and had no relevancy whatever to the controversy. The fact that in 1909 the witness bought a mare with a trowel brand upon her and gave a mortgage to secure the payment of the purchase money, had no tendency to corroborate his statement that in 1914 a colt was born to that mare and that he branded the colt with a trowel brand and sold it to defendant. The testimony offered is akin to that proposed by Jack Cade to prove that he was the Earl of Mortimer and grandson to the Duke of Clarence.

Cade: "Edmund Mortimer, Earl of March, married the Duke of Clarence's daughter, did he not?"
Stafford: "Ay, sir."
Cade: "By her he had two children at one birth."
Stafford: "That's false."
Cade: "Ay, there's the question, but I say 'tis true;
The elder of them being put to nurse,
Was by a beggar woman stolen away,
And ignorant of his birth and parentage
Became a bricklayer when he came of age,
His son am I; deny it if you can."
Smith: "Sir, he made a chimney in my father's house
And the bricks are alive to this day to testify it:
Therefore, deny it not."

The witness further testified in substance that in 1916 he sold this particular horse, which was then two years old, to the defendant; that he was then a stal-

lion, and at the time of the transfer witness, in company with the defendant and others, threw the horse down, castrated him, and placed the clover leaf, or club, brand on both jaws. In short, if the jury had believed this witness, his testimony made a complete case for the defendant.

5. The defendant also offered in evidence a complaint in an action of replevin, wherein Boze De Lore was plaintiff and Newt Morris was defendant, in which action De Lore sought to recover from Morris 35 head of horses branded on both hips with a trowel with a quarter circle beneath, claiming the right of possession by reason of a chattel mortgage given by Morris to him, the conditions of which mortgage had been broken. There was nothing in the mortgage to identify the horse in controversy as one of those included in the chattel mortgage, and even if there had been the evidence was incompetent. Defendant could not prove ownership of the animal by showing that he had mortgaged it, or that he had been sued by an outside party to recover possession of it. The evidence was properly rejected.

Exception was taken to the refusal of the court to permit defendant's counsel to interrogate J. H. Upton, of counsel for the state, in reference to his appearance as counsel in the case of *De Lore* v. *Morris,* above referred to. The relevancy of the question was not apparent and counsel for defendant made no statement as to what he expected to prove by the witness, although given an opportunity to do so. On the showing made it would appear, if the record of that trial was inadmissible, that oral testimony in regard to what occurred thereat would also be incompetent. Upon the record made we cannot say that the court erred in its ruling.

6. Another exception is to the ruling of the court permitting the state to cross-examine Jesse Allison, a witness for defendant, as to his activities on behalf of the defendant. The question tended to and in fact did elicit the information that the witness left his business without a subpoena and traveled one hundred miles to attend the session of the court when the transaction in question was being investigated by the grand jury; that he came in company with defendant and voluntarily appeared before that body, and that he attended the trial then pending without a subpoena. The interest of a witness in the subject matter, his hostility to or friendship for a party, are always factors which enter into an appraisement of the value of his testimony, and both reason and authority sustain the court's ruling.

7. An objection more plausible but unsound in our judgment, was made to the admission of the record of the "Rocker P" brand of Paul Held. It appeared from the evidence that Held had used this brand for about eleven years, but that it had not been recorded with the state veterinarian until July 23, 1917. The indictment charged that the larceny was committed February 23, 1916. It is objected that the record of the brand was inadmissible to prove ownership of the animal in question by Held prior to the time the brand was recorded. Section 8, chapter 33, Gen. Laws of 1915, is as follows:

"In all suits at law or in equity, or in any criminal proceedings when the title or right of possession is involved, the brand of any animal shall be *prima facie* evidence that the animal belongs to the owner or owners of the brand, and that such owner is entitled to the possession of the said animal at the time of the action; *provided*, that such brand has been duly recorded as provided by law. Proof of the right of any person

to use such brand shall be made by a copy of the record of the same, certified to by the state veterinarian in accordance with the provisions of this act, or the original certificate issued to him by the state veterinarian. Parol evidence shall be inadmissible to prove the ownership of a brand."

Without consuming space by further discussion, we are of the opinion that *State* v. *Randolph,* 85 Or. 172 (166 Pac. 555), settles this contention adversely to defendant. That case was thoroughly discussed and considered, and we adhere to it *in toto.* The fact that the indictment charges the offense to have been committed in 1916 is not material, as it is sufficient in this case if the proof shows the commission of the crime at any period within three years before the finding of the indictment, and it is not probable that the crime was committed, if committed at all, before the defendant began using the club brand with the quarter circle underneath, which was in December, 1915.

8. The state, over the objection of defendant, was permitted to introduce evidence tending to show that about the time the animal in question was found in defendant's possession, other animals owned by other parties were also found in his possession or claimed by him, which exhibited evidence of having upon them worked over brands similar to that upon the animal in question. As a general rule evidence of other crimes is not admissible, but where the evidence tends to show the commission of a system of crimes by unusual methods, it is admitted. In the case at bar a single instance of rebranding might be attributed to a mistake as to the ownership, or to accident, or carelessness in branding in the first instance, and in order to show system, motive and intent, the evidence was competent: *State* v. *O'Donnell,* 36 Or. 222 (61 Pac.

802); *State* v. *Germain,* 54 Or. 395 (103 Pac. 521); *State* v. *La Rose,* 54 Or. 555 (104 Pac. 299); *State* v. *McClard,* 81 Or. 510 (160 Pac. 130).

9. Error is predicated upon the refusal of the court to permit defendant to testify as to the contents of a letter which he claimed to have received from the state veterinarian, authorizing him to put a quarter circle beneath his club brand, which letter he claimed to have lost. The law points out the way in which changes in brands may be made and in which the record of brands may be perpetuated. The transactions of the state veterinarian's office are public records and the proper way of proving permission to change a brand or to adopt a new brand should be proved by certified copies of such records, which were not shown to be unavailable, and the evidence offered was incompetent. Conceding that defendant had the right to use the club brand with the quarter circle beneath it, and there is testimony indicating that he did have that right, it is difficult to see how that fact could have any bearing upon this case. The contention of the state is that defendant committed larceny by "working over" Held's brand so as to make it resemble his own, thereby destroying proof of the identity of the animal. It was not unlawful for him to brand his horses with a "Rocker P" or any other brand or device he chose, either with or without permission of the state veterinarian, provided such device did not interfere with or simulate the brand of any person having a prior right thereto. The law merely prohibits evidence of such brand being given for the purpose of identification or to prove ownership.

10. Error is predicated upon the refusal of the court to give the following instruction:

"You are instructed that in this case the defense has offered in evidence a certified copy of the brand of E. B. Wade. This was not offered nor received for the purpose of showing ownership of the animal at this time nor at the time of the alleged taking, but was offered for the purpose of showing that E. B. Wade had the right under the old brand law to use this particular brand at the time it is claimed that E. B. Wade branded the animal in question. You are further instructed that in the month of June, 1914, the said E. B. Wade had the right to use the so-called trowel brand on either or both stifles, and that if he branded the animal in question at that time with this brand, then the brand on the animal was evidence that E. B. Wade owned the animal upon which it was found. This was the law until May 9th, 1915, when the new brand law went into effect. The certificate of the brand of E. B. Wade is not before you for the purpose of showing ownership in the animal nor the right to use this brand at this time, but for the purpose above mentioned."

The instruction is faulty because it required the court to declare the legal effect of the evidence, and because it singled out a particular item of the testimony, and required the court to instruct specially upon that, thereby giving it undue prominence, which is always reprehensible. The testimony had been admitted and was before the jury for their consideration in connection with all the circumstances of the case. The instruction was likely in any event to be misleading and was properly refused.

This case was ably tried on behalf of defendant and every circumstance that could possibly tend to his exculpation was presented to the court and jury by able counsel. A perusal of the record convinces us that his trial was fair in every respect and that judgment was such as should have been rendered and it is therefore affirmed.

AFFIRMED.

BEAN, HARRIS and JOHNS, JJ., concur.

Submitted on briefs October 4, affirmed October 22, 1918.

ST. HELENS LUMBER CO. *v.* EVANS.

(175 Pac. 612.)

Exceptions, Bill of—Typewritten Sheets—Necessity of Signature of Judge.

1. Typewritten sheets, signed by court reporter, purporting to state what occurred on presentation of plaintiff's motion to dismiss appeal from a Justice Court, lacking certificate of trial judge, and failing to meet requirements of bill of exceptions, were not sufficient as such.

Justices of the Peace—Appeal—Docket—Entry of Allowance.

2. Where the original papers are regular on their face, with the exception that the docket of the justice shows no entry of allowance of appeal, such fact does not defeat an appeal otherwise regular.

Justices of the Peace—Appeal—Transcript—Certificate—"All."

3. Under Section 2463, L. O. L., providing that transcript on appeal from Justice Court shall contain copy of all material entries in justice's docket, certificate stating transcript contained all entries is sufficient; "all" including restrictive term "material."

Appeal and Error — Presumption Favoring Court Below — Denial of Motion to Dismiss Appeal from Justice.

4. Where original papers are attached to transcript of record on appeal from Justice Court, and there is sufficient certificate of justice that transcript contains all docket entries and all original papers attached, the Supreme Court must presume that the action of the trial court in denying motion to dismiss the appeal from the justice was regular, in the absence of affirmative showing to the contrary.

Appeal and Error—Making up Record—Attachment of Papers After Appeal.

5. It is within discretion of trial court, after appeal has once been taken, to cause papers omitted from record to be attached thereto, and in absence of affirmative showing to contrary it will be presumed that court acted regularly and within his powers.

From Columbia: JAMES A. EAKIN, Judge.

In Banc.

February 14, 1916, plaintiff recovered a verdict in the Justice Court for District No. 6, Columbia County, against defendant. Defendant in due time appealed. The transcript filed from the Justice's Court contained the docket entries in the Justice Court, but it is

claimed the original pleadings and exhibits were not attached. In the Circuit Court plaintiff moved for a dismissal of the appeal on the ground that the transcript showed no docket entry allowing the appeal by the Justice Court, and, further, that no original papers were annexed to this transcript. The trial judge denied the motion and allowed the original papers to be annexed to the transcript, but the record does not show just how, when or where they were so attached. The trial in the Circuit Court resulted in a verdict and judgment for defendant and plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. M. E. Miller* and *Mr. W. A. Harris.*

For respondent there was a brief prepared and submitted by *Mr. Glen R. Metsker.*

OLSON, J.—1. No bill of exceptions was filed by plaintiff. Two typewritten sheets signed by the court reporter, purporting to state what occurred upon the presentation of plaintiff's motion to dismiss appeal, accompany the transcript. These sheets are not called a bill of exceptions. They lack the certificate of the trial judge and wholly fail to fulfil the requirements of a bill of exceptions.

2, 3. The only thing before us therefore is the original papers and these on their face are regular, with the exception that the docket of the Justice Court shows no entry of allowance of appeal. This, however, does not defeat an appeal otherwise regular: *Jacobs* v. *Oren,* 30 Or. 593 (48 Pac. 431). Moreover the docket does contain a reference to the appeal being taken and an order discharging attachment upon the giving of the appeal bond, which is probably equivalent to a

docket entry of allowance of appeal. The motion is further based upon the contention that the certificate was defective under Section 2463, L. O. L., which provides that the transcript shall contain a copy of all the material entries in the justice's docket. The certificate in this case states that the transcript contains all the entries and the use of this broader term certainly includes the restrictive term "material."

4, 5. As to the general point of the motion, such motion has no affidavit attached. We have no bill of exceptions in order to show what transpired in the lower court, other than what is shown by the record. We find the original papers attached to the transcript, a sufficient certificate of the justice that the transcript contains all the docket entries and all the original papers attached thereto, and so we must presume that the action of the trial court was regular in the absence of any affirmative showing on the part of appellant. It is well settled that it is within the discretion of the trial court after an appeal has once been taken, to cause papers omitted from the record to be attached thereto, and in the absence of any affirmative showing to the contrary it will be presumed that the court acted regularly and within the powers granted him.

Judgment affirmed. Affirmed.

Argued October 2, affirmed October 22, 1918.

BROWN *v.* SHEEDY.

(175 Pac. 613.)

Frauds, Statute of—Acceptance and Receipt of Property—Evidence.

1. In replevin for possession of 87 head of cattle, plaintiff's title depending upon oral contract of sale, testimony *held* insufficient to show acceptance and receipt of property, or some part thereof, so as to satisfy the statute of frauds as to oral contract of sale of property at a price not less than $50.

[As to acceptance and delivery of goods to satisfy statute of frauds, see notes in 49 **Am. Dec.** 325; 37 **Am. Rep.** 16; 96 **Am. St. Rep.** 215.]

Trial—Motion for Nonsuit.

2. A motion for judgment of nonsuit concedes the truth of every statement made in the evidence for plaintiff.

Frauds, Statute of—Questions for jury.

3. When there is a dispute as to the facts, it must be solved by a verdict of a jury; but when the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect.

Frauds, Statute of—Performance of Contract—Change of Possession.

4. Under statute of frauds as to sale of personalty for $50 or more, a verbal transaction is not complete or binding without some physical act sufficient to indicate to an observer a change of property in the chattel involved.

Replevin—Title and Right to Possession.

5. To maintain replevin, plaintiff must show title and right to possession.

Sales—Title—Executory Contract.

6. Title does not pass while contract of sale is executory.

Sales—Breach of Executory Contract—Remedy.

7. The remedy for breach of executory contract of sale is an action for damages, not replevin.

Sales—Executory Contract.

8. Where money for cattle was to be paid at time of delivery, payment and delivery were concurrent conditions, performance of which was necessary to make contract fully executed.

From Benton: GEORGE F. SKIPWORTH, Judge.

Department 1.

This is an action in replevin to recover possession of eighty-seven head of cattle which the plaintiff alleges the defendant wrongfully detains from him in Benton County, Oregon, to his damage in the sum of $1,000, the value being laid in the sum of $4,410.

The answer traverses all the allegations of the complaint except that the defendant has refused to deliver the cattle. The defendant pleads ownership in himself and the right of possession. On information and belief, he further avers that the plaintiff claims title to the animals by virtue of an alleged contract of sale which the defendant denies and charges in substance that if there were such a contract, it is void because it was not embodied in any writing expressing a consideration and subscribed by the defendant or his lawfully authorized agent; that if any agreement existed, it was for the sale of personal property at a price of more than $50, and that the plaintiff did not, neither did anyone for him, accept or receive any part of the property or pay at the time any part of the purchase money.

All the new matter of the answer was denied by the reply. At the close of the testimony for the plaintiff, the court sustained the defendant's motion for judgment of nonsuit, on the ground that the plaintiff had not proved a case sufficient to be submitted to the jury. The plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Weatherford & Weatherford, Mr. George W. Denman* and *Mr. Henry L. Heil,* with an oral argument by *Mr. James K. Weatherford.*

For respondent there was a brief over the names of *Mr. E. D. Horgan* and *Messrs. McFadden & Clarke,* with an oral argument by *Mr. Arthur Clarke.*

BURNETT, J.—1. The plaintiff's brother acted as his agent and went to the home of the defendant to buy some cattle. He looked over one band the defendant had at what was called the Magee place, and some others at his home place, and without closing the deal at that time left the place and went to look at some more of the defendant's cattle on Mary's River. When asked what occurred after he returned, he answered:

"I just rode back to the place and he [referring to the defendant] walked out of the stable door just as I came along, with a pitchfork in his hand, and I says, 'Sheedy, I wouldn't have a hoof of those cattle on the river.' I says, 'We will just be confined to the cattle right here on the ground.' I says, 'I can just take forty head of those cows, seventeen out of the cattle at the Magee place and the other twenty-three out of this bunch.' He says, 'All right, you can have them cattle.' Just that way."

Speaking about his previous examination of the cattle, he said:

"I walked through amongst them and I says, 'I will take this cow and that cow and that cow,' just pointing them out to him."

He said also that he was to give the defendant $50 a head for the cows and $30 each for the yearlings. He was to take the yearlings as they stood. Asked what arrangements he made with Sheedy about taking care of the cattle, he said:

"Those cattle were to be taken the same care of, and fed just the same and at the same places, put in the shed, those calves or yearlings, until the next Monday, the fifth, I think it was the fifth, anyway it was Monday. I was to go and receive those cattle right there and pay for them."

He asked Sheedy to do that and he said he would. He further narrated as follows:

"I offered him a thousand dollars and he said he didn't want any money. He said Lee Brown had money enough to buy and sell us both, and I told him I had rather give him the money and then he would know what he had done, but he didn't want it."

The following also appears in his direct examination:

"Q. Mr. Brown, what did Mr. Sheedy say with reference to parting with title to the cattle?
"A. He said they were my cattle.
"Q. What did you say?
"A. I told him all right, and we set a day for me to come and take the cattle away, and I was there to take them away, too, with the money."

This witness gave other evidence to the effect that on the following Monday he and the plaintiff went together to Sheedy's farm, demanded the cattle and offered to pay for them, but defendant refused to take the money or deliver the cattle. Testimony also appears for the plaintiff respecting the value of the stock.

On cross-examination the witness testifies thus:

"Q. How long was it after you selected those cows before you bargained with him?
"A. I suppose it was about an hour.
"Q. Did you bargain?
"A. Yes. Just time for me to ride from Sheedy's over to Marysville and back over to his place.
"Q. Then you told him you would be back a week from Monday and take the cattle and pay for them?
"A. Yes, sir."

On redirect examination on this point, his testimony runs thus:

"Q. Clarke was asking you about the receipt of these cattle. When did you receive them?

"A. The twenty-seventh of January, the day I was there."

The testimony of the plaintiff himself refers simply to the occurrence of the following Monday when the defendant, as admitted by his answer, refused to deliver the cattle. The cattle were not segregated from the larger herds and were in no way disturbed in their usual custody.

The Oregon statute of frauds so far as applicable to the case at hand reads thus:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:— * * (5) An agreement for the sale of personal property at a price not less than $50, unless the buyer accept and receive some part of such personal property, or pay at the time some part of the purchase money."

2, 3. The motion for judgment of nonsuit concedes the truth of every statement made in the evidence for the plaintiff and is in the nature of a demurrer to the evidence. It is true that when there is a dispute as to the facts it must be solved by a verdict of a jury, but as said by Elliott on Contracts, Volume 2, section 1340:

"When the facts in relation to a contract of sale alleged to be within the statute are not in dispute, it belongs to the court to determine their legal effect."

The crux of the controversy is for the court to determine whether there was a delivery of the cattle by the defendant, for without delivery there can be neither

receipt nor acceptance, and whether the plaintiff accepted and received the property or any part thereof.

The rule is thus laid down by Mr. Justice LORD in *Galvin* v. *MacKenzie,* 21 Or. 184, 186 (27 Pac. 1039):

"To constitute an acceptance within the meaning of this provision, the purchaser must so deal with the property as to prove that he acknowledges the existence of the contract. There must be some act on his part plainly recognizing the existence of the contract and that the property has been received in accordance therewith. The property must be completely transferred, which includes both delivery by the vendor and acceptance by the vendee. There must be delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual receiving and acceptance by the latter with the intention of taking possession as owner."

Again, says Mr. Chief Justice BEAN, in *Reynolds* v. *Scriber,* 41 Or. 407, 410 (69 Pac. 48):

"To constitute a part performance, however, within the meaning of this rule, the acts relied upon for that purpose must have reference to the contract, and clearly appear to have been done solely with a view to its performance. Acts merely preliminary or ancillary to the agreement, such as delivering an abstract of title, giving directions for a conveyance, the preparation of the agreement, making valuations, and other like acts, are not sufficient. Whatever was done must have been done under the contract, and in part performance of its terms, and should tend to show not only that there had been an agreement, but throw some light upon its nature, so that neither the fact of the contract nor its execution rests solely upon parol evidence."

The principle is thus stated in *Beedy* v. *Brayman Co.,* 108 Me. 200 (79 Atl. 721, Ann. Cas. 1913B, 273, 36 L. R. A. (N. S.) 76):

"There may be a complete delivery at common law without either receipt or acceptance under the statute.

The former is the act of the vendor; while receipt, which affects the possession, and acceptance, which affects the title, are the acts of the purchaser, and both receipt and acceptance are essential. Nor can such receipt and acceptance be shown by words alone, where such words are part of the alleged oral bargain and sale. But receipt and acceptance need not be contemporaneous with the alleged contract, if made in pursuance of it; nor need they be simultaneous. The former may precede or follow the latter. No act of the vendor alone can be effective to make delivery, without receipt and acceptance, and take the case out of the statute. If the vendee does any act to the goods, of wrong if he be not their owner, and of right, if he be their owner, the doing of the act is evidence that he had accepted them."

In *Wilson* v. *Hotchkiss,* 21 Cal. App. 392 (132 Pac. 88, 93), the judgment of the trial court was reversed for its refusal to give the following instructions:

"Mere words are not sufficient to prove a receipt or acceptance of the personal property to take an oral contract of the sale of personal property for a price exceeding $200 out of the statute of frauds. The acts of the parties proved must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer.

"To satisfy the statute of frauds there must be a delivery by the seller, with an intention of vesting the right of possession in the buyer, and there must be an actual acceptance or receipt by the buyer, with the intention of taking possession as owner. This rule can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intention of the parties."

In *Devine* v. *Warner,* 75 Conn. 375 (53 Atl. 782, 96 Am. St. Rep. 211, 228), a paragraph of the syllabus reads thus:

"An acceptance of goods, sold under an oral contract of sale, to satisfy the statute of frauds requires

more, by way of proof of receipt and acceptance, than mere words, indicative merely of the parties' assent to the agreement of sale, and it is not enough to satisfy the condition of acceptance that the title to the goods has merely become vested in the purchaser."

The annotator to the opinion in the American State Reports appends this matter:

"There must always be an unconditional acceptance of the goods purchased by the buyer under a verbal contract of sale in order to satisfy the requirements of the statute of frauds. In other words, to constitute a sufficient delivery under an oral agreement for the sale of personal property, the property must be placed within the control, and under the exclusive dominion of the buyer: *Marsh* v. *Rouse,* 44 N. Y. 643. The acceptance and receipt of merchandise under an oral contract of sale sufficient to satisfy such statute, must be such a transfer of the physical possession of the property as places the goods beyond the control of the vendor and within the control of the vendee. Such transfer is not accomplished, where, under such contract, the goods are left in the possession and control of the vendor, pending the taking of an inventory by him to determine the price to be paid for the goods: *Brunswick Grocery Co.* v. *Lamar,* 116 Ga. 1 [42 S. E. 366]. To make a verbal sale of chattels valid under the statute of frauds delivery must be made, the vendee must take actual possession, that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be continuous, not taken to be surrendered back, not formal but substantial. * * To constitute a delivery and acceptance of goods, such as the statute of frauds requires under a verbal contract of sale, something more than mere words is necessary. Superadded to the language of the contract and the declarations of the parties there must be some act of theirs amounting to a transfer of the possession and an acceptance thereof by the buyer and the case of cumbrous articles is not an exception to this rule

(citing authorities). Mere words alone, unaccompanied by acts, cannot make out a delivery and acceptance of goods, because a delivery of goods to take a contract of sale out of the statute of frauds, must be of such a nature that the property is placed under the control and power of the vendee, and the acts, to change the possession of the property from the vendor to the vendee, must be such as to deprive the vendor of his right of lien as security for the payment of the purchase money."

In addition to the precedents noted in his brief, counsel for the plaintiff pressed upon our attention at the hearing the case of *Smith & Son* v. *Bloom,* 159 Iowa, 592 (141 N. W. 32), as authority sustaining his contention. There the plaintiff sought to recover damages for breach of a parol contract for the sale of some sheep, and the defense was based on the statute of frauds. Premising that the Iowa statute forbids oral testimony only when "no part of the property is delivered," we note that the facts there involved were substantially that the sheep were in the possession of the plaintiffs in a pen assigned to their use in the Union Stockyards at South Omaha when the defendant applied to them to buy the animals. At his request and in his presence they were taken out of that pen to the stockyard scales where the defendant gave his name to the weighmaster as purchaser. They were weighed by the servant of the Stockyards Company over whom the plaintiffs had no authority, and then with the assent of the defendant they were driven into another pen entirely out of the control of the plaintiffs and subject to the order of the defendant. The essence of the decision is that all this was sufficient to take the case to the jury in satisfaction of the Iowa statute requiring delivery only without reference to receipt or acceptance. It will be observed also that

the testimony disclosed positive acts of the parties and not mere words alone.

4. The object of our statute was to prevent frauds and perjuries. It was sought to accomplish this purpose by requiring something more than spoken words as evidence in certain instances, one of which is the sale of personalty for $50 or more. The verbal transaction is not complete or binding without some physical act sufficient to indicate to an observer a change of property in the chattel involved. To hold otherwise would be to emasculate the statute and invite invasions of its requirements. In the instant case the testimony narrates much that was said, but it discloses no act of the defendant whatever and none performed by the plaintiff but what might have been done by anyone looking at the cattle without intending to assert ownership of them or being in the least guilty of any wrong to the owner, within the meaning of the rule laid down in *Beedy* v. *Brayman Co.*, 108 Me. 200 (79 Atl. 721, Ann. Cas. 1913B, 273, 36 L. R. A. (N. S.) 76). As narrated by the witness for the plaintiff, nothing occurred at the Sheedy farm when he was bargaining for the cattle that would have indicated in the least to any looker-on, who heard nothing, that any change of control of the animals had occurred.

The terms of the statute are cogent in declaring that the agreement is void unless it is in writing, properly subscribed. This is the rule. The exception is found in the language, "unless the buyer accept and receive some part of the personal property, or pay at the time some part of the purchase money." As a condition precedent to being allowed to prove his case by oral testimony it was required of the plaintiff that he establish the performance of a corporeal act which, inde-

pendent of the mere words uttered at the time, clearly indicated that he accepted and received the property or some part thereof. As a matter of law the testimony fails to establish any such condition.

5–8. Again, the success of the plaintiff in this action of replevin depends upon his showing title and right to the possession of the cattle. Title does not pass while yet the contract is executory. The remedy at law for the breach of such an agreement is an action for damages. Specific performance of it cannot be worked out by replevin. It is not pretended but that the money for the animals was to be paid at the time of their delivery. In such a transaction, in order to make the contract fully executed, payment of the money and delivery of the chattels are concurrent conditions to be accomplished simultaneously and until so carried out either party can revoke the contract, if otherwise valid under the statute, subject only to an action to recover damages for its breach. In any view of the case, therefore, the plaintiff failed to establish either title or right to possession of the cattle. The judgment of nonsuit was the only conclusion legally to be derived from the case made by the plaintiff. It is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued October 11, reversed and remanded October 22, 1918.

SABIN *v.* CHRISMAN.

(175 Pac. 622.)

Execution—Custody of Property—Delivery to Bailee.

1. An officer making levy of an execution may, at his own risk, deliver the property levied upon to a bailee and take a receipt therefor, and in such case the goods are regarded as still being in his custody.

Execution—Wrongful Execution—Liability of Plaintiff in Writ.

2. Where an officer levies a writ of execution on the property of a stranger, the latter may sue plaintiff in the writ, either for reclamation of the property or to recover damages, though property was destroyed or sold subsequent to wrongful levy.

Sheriffs and Constables — Wrongful Execution — Liability of Officer Making Execution.

3. An officer who levies execution on property of a stranger is guilty of conversion, although levy was made in good faith, and although property was not actually taken or removed.

Sheriffs and Constables—Conversion—Liability of Sheriff.

4. A sheriff, who levied execution upon property that had passed from defendant named in writ into the hands of his assignee for benefit of creditors, was liable for conversion of such property, although he had not removed it, and had placed it in the hands of a third party, from whom he had taken receipt.

[As to liability of sheriff for misperformance of official duties, see note in 95 **Am. St. Rep.** 96.]

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 2.

This is an action of damages for a conversion. The cause was tried by the court without a jury, resulting in the findings of facts and conclusions of law and a judgment in favor of defendants. Plaintiff appeals.

The facts necessary to an understanding of the case are as follows: On the fifteenth day of August, 1914, P. Perlman, who was the owner of a stock of mer-

chandise, including the stoves and ranges involved in this action, transferred the same by deed of assignment to R. L. Sabin, plaintiff for the benefit of his creditors *pro rata*. The possession of the property was taken by Mr. Sabin, through his agent, Mr. J. M. Foster, on the following day. The validity of this transaction was passed upon and approved by this court in the case of *Sabin* v. *Chrisman et al.*, 79 Or. 191 (154 Pac. 908). On August 19, 1914, defendant Levi Chrisman, sheriff of Wasco County, Oregon, accompanied by the attorney for the Portland Association of Credit Men, the other defendant herein, proceeded to the store at The Dalles, Oregon, being then armed with an execution on a judgment in favor of the Portland Association of Credit Men and against P. Perlman, the former owner of the store. They found in the store one J. S. Fine who was then employed as a clerk by J. M. Foster, the agent of R. L. Sabin. The sheriff was informed of the assignment and that Mr. Foster was in charge for the assignee. Mr. Foster who had stepped out for a few moments returned to the store and protested against the levy. The sheriff then proceeded to levy upon the entire stock in the store, but was induced to levy upon a portion of the goods only; Mr. Foster protesting. The sheriff designated seven cooking-ranges, which were in the store already segregated, and placed them in charge of Mr. J. S. Fine, whom he knew and had confidence in to hold for the sheriff and took a receipt from Mr. Fine, which is as follows:

"The Dalles, Oregon,
"August 19th, 1914.

"Received from Levi Chrisman, Sheriff, of Wasco County, Oregon, Seven steel cooking ranges levied

upon under execution in case of Portland Association of Credit Men vs. P. Perlman.

"J. S. FINE, Mgr."

The ranges were not removed by the sheriff nor by the plaintiff or his agents, but remained continuously in the care of J. S. Fine until August 29th, when they were destroyed by fire, together with other property. The loss was not occasioned by any fault of the sheriff or the other defendant, nor of the plaintiff or his agents. The sheriff did not leave with J. M. Foster or J. S. Fine either a copy of the execution or notice specifying the property levied upon. The defendant sheriff testified in regard to the levy that:

"He [Foster] came back and said the stock was in their hands, and wanted to know if I could not levy on sufficient property to cover the execution without locking the store up, and I told them I would, and I took possession of a number of ranges. Q. Just tell what you did, Mr. Chrisman. * * The receipt shows for itself; that is what I did."

And stated to the effect that Fine was holding the property in question for him as the receipt showed. It is admitted that at the time of the alleged levy, the personalty in question was of the value of $225.50, and that Sabin was the owner and entitled to the possession of the property. The trial court made findings of fact to the purport as above stated, and found as conclusions of law: That the acts of the sheriff, Levi Chrisman, as hereinbefore set forth, did not constitute a levy and did not operate to dispossess the plaintiff, R. L. Sabin, or his agents of said goods and chattels, and:

"That the acts of said Levi Chrisman and Portland Association of Credit Men, or either of them, as hereinbefore set forth, did not constitute a conversion; that the defendants are not liable to the plain-

tiff in any sum whatsoever and said action should be dismissed."

A judgment was rendered accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

For appellant there was a brief, over the name of *Messrs. Teiser & Smith,* with an oral argument by *Mr. Sidney Teiser.*

For respondents there was a brief and an oral argument by *Mr. Maurice W. Seitz.*

BEAN, J.—Plaintiffs take the position that in view of the fact that the property was not the property of the judgment debtor: Citing *Sabin* v. *Chrisman et al.,* 79 Or. 191 (154 Pac. 908), the sheriff's taking possession of, and assumption of control over the ranges, and his interference with plaintiff's dominion over the property, constituted a conversion. And as the property had never been returned to him by the sheriff or the other defendant, he was entitled to damages to the extent of the value of the property, notwithstanding the same had been destroyed by fire. The defendants contended: First, that the acts of the sheriff did not constitute a valid levy, or give the sheriff any jurisdiction over the property, or change possession thereof; second, that even if the acts of the sheriff could be called a levy, it was a mere paper levy, and insufficient to constitute a conversion; that the goods having been left in the actual possession of the agents of plaintiff, their subsequent destruction by fire without fault or dereliction on the part of defendants does not furnish ground for any liability against either of them.

As we understand it, it is not a question as to whether or not the levy of the execution on the judg-

ment against Perlman by the defendant sheriff created a lien on the property. In order for the levy to have had such an effect, the property must have belonged to Perlman. The question for determination here is, Did the sheriff and the plaintiff in the writ commit a trespass on Sabin's property by wrongfully interfering therewith, in a manner subversive of the rights of plaintiff who was the owner of the personal property to his injury?

In 38 Cyc., 2005, it is said:

"Conversion is 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' The legal wrong denominated 'conversion' is any unauthorized act of dominion or ownership exercised by one person over personal property belonging to another, and 'trover' is the technical name of the common-law action provided for the redress thereof."

Under no other rule can a person be protected in his right to property.

In *Budd* v. *Multnomah Street Ry. Co.*, 12 Or. 271 (7 Pac. 99, 53 Am. Rep. 355), the court said:

"The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of a conversion."

See, also, 2 Cooley on Torts (3 ed.), p. 859; *Ramsby* v. *Beezley*, 11 Or. 49, 51 (8 Pac. 288); *Madden* v. *Condon National Bank*, 76 Or. 363 (149 Pac. 80); *Gregory* v. *Oregon Fruit Juice Co.*, 84 Or. 199, 202 (164 Pac. 728); *Velsian* v. *Lewis*, 15 Or. 539 (16 Pac. 631, 3 Am. St. Rep. 184); *Scott* v. *Perkins*, 28 Me. 22 (48

Am. Dec. 470), note to *Bolling* v. *Kirby* (Ala.), 24 Am. St. Rep. 789; *Wintringham* v. *Lafoy*, 7 Cow. (N. Y.) 735; *Connah* v. *Hale*, 23 Wend. (N. Y.) 462; *Phillips* v. *Hall*, 8 Wend. (N. Y.) 610 (24 Am. Dec. 108); *Allen* v. *Crary*, 10 Wend. (N. Y.) 349 (25 Am. Dec. 566); *Fonda* v. *Van Horne*, 15 Wend. (N. Y.) 631 (30 Am. Dec. 77).

1, 2. An officer making a levy of an execution may at his own risk deliver property levied upon to a bailee and take a receipt thereof. The goods are regarded as still in the officer's control: 4 Cyc. 661–663; 2 Freeman on Executions, § 262; *Palmer-Haworth Logging Co.* v. *Henderson*, *post*, p. 192 (174 Pac. 531). Where an officer levies a writ of execution on the property of a stranger, the plaintiff in the writ is liable to the owner and person having the right of possession thereof, when he directed the wrongful levy. And such owner has a right of action at once, either for the reclamation of the property, or to recover damages. It not being material that the property was sold or destroyed subsequently to the wrongful levy: 4 Cyc. 762, 764; 2 Freeman on Executions (3 ed.), § 273; 2 Cooley on Torts (3 ed.), p. 895.

In Crocker on Sheriffs (3 ed.), Section 436, it is said:

"It may be said however, generally, that there can be no valid levy upon personal property, under an execution as against any other party than the judgment debtor, unless such property is present and subject to the disposition and control of the officer seeking to make the levy; and unless he takes possession of it, or exercises such dominion over it as will render him a trespasser, if the process under which he acts is not a protection to him. But to constitute a valid levy, or to make the officer a trespasser in such case, it is not necessary that he should take actual posses-

sion of, or touch or manually interfere with the property. It is sufficient in either case, if the property is present, that he claims to exercise control over it by virtue of his writ, or that he makes an inventory of it, or threatens to remove it, unless a receiptor is given. It is not necessary: * * that the officer should leave any person in possession of the property; nor that he should remove the same."

In 35 Cyc. 1671, it is stated:

"Where the officer levies on the property of one person under process against another and takes possession of the property, he is liable to the owner for the loss thereof, although such loss was not due to his fault (citing *Duncan* v. *Stone,* 45 Vt. 118); but no such liability accrues where the officer did not take possession of the property levied on, and the loss was not attributable to his fault or to the making of the levy": Citing *Sammis* v. *Sly,* 54 Ohio St. 511 (44 N. E. 508, 56 Am. St. Rep. 731).

3. It is well settled that the good faith of an officer, or the innocence of his intent do not relieve him of liability for levying on property which does not belong to defendant in the process under which he acts: 35 Cyc. 1660; *Meadow* v. *Wise,* 41 Ark. 285; *Ilg* v. *Burbank,* 59 Ill. App. 291; *Duperron* v. *Van Wickle,* 4 Rob. (La.) 39 (39 Am. Dec. 509); *Snyder* v. *Berger,* 3 Sadler, 318 (6 Atl. 733); *Campbell* v. *Ulch,* 24 Tex. Civ. App. 618 (60 S. W. 272).

The rule is stated in 35 Cyc. 1652:

"Where a sheriff or constable, acting under a writ which specifies no particular property to be levied on thereunder, levies on property belonging to a person other than defendant in the writ, he is liable to the owner of the property for the resulting damage; and the sheriff's liability for such a wrongful seizure is not dependent upon his selling the property."

Sammis v. *Sly*, 54 Ohio St. 511, relied upon by defendants, is a case where an attachment was levied on the property of a third person under the mistaken belief that it belonged to the defendant in the writ. But no such custody was taken of the property by the officer as deprived the owner of his control over it and it was lost by fire before the commencement of a suit for the conversion. The court in that case took the precaution to state that:

"If the property had been taken into the actual custody of the officer and so as to deprive the owner of any control over it, a different rule of liability might apply."

When an officer wrongfully exercises a right of dominion over personal property, he is guilty of a conversion, and a levy on chattels in the hands of a third person is a trespass: 2 Freeman on Executions (3 ed.), § 272; *Spaulding* v. *Kennedy*, 6 Or. 208; *Lewis* v. *Birdsey*, 19 Or. 164 (26 Pac. 632); *Marks* v. *Shoup*, 181 U. S. 562 (45 L. Ed. 1002, 21 Sup. Ct. Rep. 724); *Connah* v. *Hale*, 23 Wend. (N. Y.) 462, 466.

The law seems to be more strictly construed against the plaintiff in the writ or those claiming under the writ as to what constitutes a sufficient taking possession under the writ, than against a third person like Sabin, who complains of the taking of his property under a writ against the debtor such as Perlman. In the latter case, it is held that manual possession is not necessary to constitute the taking a trespass, if it be such as for the time is recognized as authoritative by the party dispossessed as Sabin was in this case. It is sufficient to lay the foundation of an action against the officer, if he unlawfully exercised authority over the chattels, against the will and to the exclusion of the owner, although there was no actual taking of the

property or removal: 1 Wade on Attachment, § 242; 2 Freeman on Executions (3 ed.), § 260, p. 1453.

4. The findings of the trial court and the undisputed evidence show that the defendant Chrisman pursuant to the direction of the other defendant attempted to levy upon the property of the plaintiff under a writ of execution against the property of one Perlman. The property was then in the possession of plaintiff by his agents in a certain store building. The plaintiff was divested of the control of the cooking-ranges, and the same were placed in charge of J. S. Fine as bailee for the sheriff in exclusion and defiance of plaintiff's right. The receipt taken by the sheriff shows that the personal property was levied upon under the execution and that the same was received from the sheriff by Fine. It is clear that the sheriff had actual control of the goods by the assistance of the keeper Fine. The acts of the sheriff constituted a wrongful exercise of dominion over plaintiff's property, and a denial of his right to the use and enjoyment of the same. It was not a mere paper levy. It amounted to a conversion of the property. The findings of the trial court do not support the judgment. It is not important whether the property was moved from one place to another, but whether the same was wrongfully taken from the control of the owner, Sabin. For aught that appears had it not been for the attempted levy, the goods might have been sold, and not have been lost.

The judgment of the lower court will be reversed and the cause remanded with directions to enter a judgment in favor of plaintiff against the defendants for $225.50, the value of the goods at the time of the levy.

REVERSED AND REMANDED WITH DIRECTIONS.

MCBRIDE, C. J., and JOHNS and OLSON, JJ., concur.

Argued September 28, affirmed October 25, 1918.

HOUSTON v. BARNETT.*

(175 Pac. 619.)

Landlord and Tenant—Lease—Misrepresentation—Estoppel.

1. After lessee had personally investigated premises before delivery of lease, and had for six years complied with all the provisions of the lease without complaint, and then upon assigning it had received in consideration property equal to what he had paid thereunder, he could not claim that he was induced to enter lease by misrepresentation or deception.

Landlord and Tenant—Assignment—Liability of Assignor.

2. Lessee who assigns lease continues liable on the covenants to pay rent and taxes which accrue subsequent to the assignment.

Landlord and Tenant—Lease—Assignment—Liability of Assignee.

3. Assignee of a leasehold is personally liable for rent accruing while he retains the leasehold.

[As to assignment of leases and respective rights and liabilities of the lessee, assignee and assignor thereafter, see note in 10 **Am. St. Rep.** 557.]

Specific Performance—Lease—Arbitration Agreement.

4. Where fifteen-year lease contained an arbitration clause, which defined minimum rent and purchase price for the last five-year period, and provided how and by whom the increase should be determined, a court of equity, upon lessee's refusal to comply, has jurisdiction to ascertain rental payable during last five years, and to grant specific performance of the arbitration agreement, which was a mere incident of lease and not of the essence thereof.

From Multnomah: HENRY E. McGINN, Judge.

Department 2.

This is a suit to enforce the specific performance of the terms of a fifteen-year lease with an option to purchase, of certain lands on the Willamette River between Portland and St. Johns, executed by the plaintiffs to the defendant W. M. Barnett on March 29,

*For authorities passing on the question of liability of assignee of leasehold for rent, see note in 14 **L. R. A.** 151.

On liability of lessee, sublessee or assignee for rent accruing after assignment or sublease, see note in 52 **L. R. A. (N. S.)** 968.

On arbitration agreements, their validity and binding force, see note in 47 **L. R. A. (N. S.)** 337. REPORTER.

1906. On July 28, 1911, the lease was assigned by Barnett through W. O. Hadley to the defendant J. O. Elrod. The specified rental for the first five years of the lease is immaterial to this opinion. For the next five years the lessee promised to pay an annual rental of $1,200 in advance, on March 29th of each year. For the remaining five years of the term the lease provided:

"Fifth: For the last five (5) years of the said term, to-wit, the eleventh, twelfth, thirteenth, fourteenth and fifteenth, the increase of the rent above Twelve Hundred Dollars ($1200.00) per year shall be agreed upon by the lessors, and the lessee, and in the event of their being unable to agree then the amount of such increase shall be settled by arbitration, the lessors to select one arbitrator and the lessee another, and the two persons thus selected a third, and the decision of the three persons thus selected, or the majority thereof, shall be binding and final upon the parties hereto."

Under the sixth clause of the lease the lessee had an option to purchase upon the terms and conditions therein stated. Paragraph 9 provided:

"The lessee in addition to the sums of rent herein agreed to be paid, further undertakes, promises and agrees to pay all taxes and public assessments of every nature or kind which may be assessed or levied and becoming due and payable against the said demised premises during the term of this lease."

Paragraph 10 stipulated that the lessors should furnish to the lessee an abstract of title, "at the time of the execution of this lease, which shall show a fee-simple title in them, free and clear of all liens, except a mortgage or $1,000," which the lessors agreed to pay. In the event that the lessee should exercise his option to purchase, the lessors would convey the

premises "by general warranty deed with covenants of seizin and against encumbrances." By the eleventh clause it was agreed

"that in the event of either party neglecting or refusing for the period of thirty (30) days to appoint an arbitrator to arbitrate the increase in the rent for the last five (5) years of the said term or the increase of the purchase price of the property under the option for the last five years of said term, then in that event either party hereto may apply to the Circuit Court of the State of Oregon for the County of Multnomah, and secure the appointment of an arbitrator to represent the party so refusing, and such appointment shall be final and binding."

The stipulated rent was paid by Barnett up to the time that he made his assignment to Elrod, after which Elrod paid the rent and taxes for two years, and since that time no rent or taxes have been paid by anyone, except the taxes for 1913, which were paid by Elrod. The plaintiffs allege that under the fifth clause of the lease they sought to agree with the lessee as to the annual rental for the last five years of the term, and carry out the conditions of that clause, which both Elrod and Barnett refused to do. This suit was brought to recover from the defendants $2,400 and interest, as accrued rental, together with the rent from March 29, 1916, to March 29, 1921, and the amount of certain taxes on the property which the plaintiffs claimed they paid. The court was asked to appoint an arbitrator, under clause 5, to fix the annual rent for the last five years of the lease.

There is no controversy as to the execution and delivery of the lease, the performance of its conditions for the first eight years, or the failure and refusal to pay the rent and taxes for the past seven years. As a defense Barnett alleges: First, that the

plaintiffs and the defendants mutually waived the arbitration clause of the contract, by reason of which it was abrogated; second, that the plaintiffs did not have a fee-simple title to lot 25 in Melvin; third, that the plaintiffs made certain representations as to the use of the premises for a mill site and as to available transportation facilities; fourth, that after the assignment of the lease to Elrod the plaintiffs entered into an agreement with him without the knowledge or consent of Barnett, by reason of which the latter was discharged; and fifth, that the lease erroneously stated the time as fifteen years, whereas it should have said ten years. As a defense Elrod pleads: First, surrender, cancellation and estoppel; second, that he assigned the lease to Beeman before the suit was instituted, whereby he was released from payment of rent not then accrued, and that Beeman is a proper party and should be made a defendant; and third, that the plaintiffs' title to "Nolan's Sand Bank" failed.

Under the eleventh clause of the lease, arbitrators were appointed by the court, who found that under clause 5, for the last five years of the lease, there should not be any increase in the annual rental above $1,200.

The court made eleven different findings of fact sustaining all of the material allegations of the complaint, and also findings of fact upon each further and separate defense of the respective defendants, to the effect that neither of them was sustained by the evidence. A decree was rendered against the defendants W. M. Barnett and J. O. Elrod for the sum of $4,608, with interest thereon from the date of the decree at the rate of 6 per cent per annum, together with costs. The defendants appeal. AFFIRMED.

For appellant W. M. Barnett, there was a brief over the names of *Mr. Plowden Stott* and *Mr. John T. McKee,* with an oral argument by *Mr. Stott.*

For appellant J. O. Elrod, there was a brief over the name of *Messrs. Veazie, McCourt & Veazie,* with an oral argument by *Mr. J. C. Veazie.*

For respondents there was a brief over the name of *Messrs. Logan & Smith,* with an oral argument by *Mr. Isham N. Smith.*

JOHNS, J.—The lease provides for four rental periods, the first two of which are unnecessary to this opinion. The third states that "the lessee undertakes, promises and agrees to pay the sum of $1,200 per annum in advance as rental"; the fourth provides that "the increase of the rent above $1,200 per year shall be agreed upon by the lessors and the lessee," and in the event that they cannot agree each shall select one arbitrator, the two selected shall choose a third and the majority thereof shall be binding. Under the eleventh clause the lease provides that if either party should refuse to appoint an arbitrator for a period of thirty days, to determine the rental increase for the last five years, upon application therefor the Circuit Court should appoint such arbitrator to represent the party refusing, and such appointment should be final and binding. It will thus be seen that as to the third period the amount of the rent is stipulated and that the lessee specifically "undertakes, promises and agrees" to pay the amount stated.

It is alleged and the proof shows that the rent was not paid for either one of the last five years, and that the defendant not only refused to pay the rent, but

denied any liability. For such reason the court appointed an arbitrator to act for and represent the lessee, as provided for in clause 11. The arbitrators found that there should not be any increase of the stipulated minimum rental.

The record shows that the defendant Barnett was a man of mature years and of large business experience, and that after negotiations which covered a considerable period of time, with the plaintiff Joseph G. Houston, he personally inspected and made a careful examination of the premises, after which the terms and conditions of the lease and option were fully discussed and agreed upon. An attorney was employed by the plaintiffs herein to draft the lease, and the agreement which is now in controversy was then drawn and executed by both parties and left with him pending the examination of the abstract of title by another attorney employed by Barnett for that purpose.

1. A period of at least three months intervened between the inspection of the premises by Barnett and the delivery of the lease, and at least six months elapsed between the inception of negotiations and the date of such delivery. After the delivery of the lease the lessors and lessee agreed upon the assignment of a land certificate in lieu of the provisions of the first clause of the lease, and Barnett paid the stipulated rental for the fourth and fifth years provided for in the second clause of the lease. Thereafter he paid the first annual rent named at $1,200, provided for in the third clause. In other words, Barnett complied with all of the terms and conditions of the lease by him to be kept and performed, for a period of six years. On July 28, 1911, he assigned all of his right in the lease and option to the defendant Elrod and in

consideration thereof received property substantially equal in value to the same amount which he had paid the plaintiffs under the terms of the lease. In the face of this transaction and the facts shown by the record, Barnett cannot now claim or assert that he was misled or deceived by the plaintiffs. He had made a personal inspection of the premises and had ample time and every opportunity to make a full and fair investigation before the lease was delivered. For six years after the delivery he complied with all of the terms and provisions of the lease without any complaint or criticism, and then unloaded the lease upon the defendant Elrod, from whom he received practically the same amount that he had paid the plaintiffs as rental.

On July 28, 1911, Barnett assigned the lease to Elrod, who paid the stipulated rental and accrued taxes for two years, then declined to make any further payments and denied any liability, claiming that he had been released.

We have carefully read the testimony and are of the opinion that the plaintiffs did not, and never intended to, release either of the defendants. The testimony of the plaintiff Joseph G. Houston would indicate that he is somewhat of a Shylock, but it also tends to show that he relied upon and expected to enforce the terms and conditions of his lease until such time as he received the purchase price of, and parted with his title to, the property.

2, 3. Notwithstanding the assignment, Barnett as lessee continued liable on the covenants in the lease to pay rent and taxes which accrued subsequent to the assignment. After the transfer the assignee then became liable to the lessors for the rental and taxes, and the lessors at their election could then sue either

the lessee or the assignee, or both at the same time, although they could have but one satisfaction. It is well settled that the assignee of a leasehold is personally liable for rent accruing while he retains the leasehold: 16 R. C. L., § 352, and authorities there cited.

The defendants contend that a court of equity does not have jurisdiction of this controversy and claim that they were released from all liability. Clause 5 of the lease specifically provides for a minimum rent of $1,200 per annum for the last five-year period; that upon the failure to agree as to any increase of such rent arbitrators should be appointed and that the findings of the majority thereof should be binding. Clause 6 stipulates how any increase in the purchase price for the same period should be determined. Clause 11 provides that upon the failure of either party to appoint an arbitrator, under clause 5 or 6, the other party "may apply to the Circuit Court of the State of Oregon for the County of Multnomah and secure the appointment of an arbitrator to represent the party so refusing, and such appointment shall be final and binding." While such clauses define the minimum amount of the rent and purchase price, yet any increase of either was to be determined by arbitration. When the defendants denied further liability it must follow that they thereby refused and neglected to comply with the terms and provisions of either clause 5, 6 or 11 of the lease; and to protect and define their rights, the plaintiffs were then obliged to apply to the court to obtain the specific performance of that portion of the contract which provided for the appointment of arbitrators to determine the amount of the increase, if any, in the annual rent and the purchase price for the last five years of the lease. Denying liability, the defendants have no

right to complain that the plaintiffs asked the court to do that which the contract specifically provided should be done. According to the notes appended to the report of the case of *Williams et al.* v. *Branning Manufacturing Company* in 47 L. R. A. (N. S.) 337, 380 (154 N. C. 205, 70 S. E. 290) and the authorities there cited, persons are not allowed to enter into contracts which will oust the courts of their jurisdiction over the subject matter of such contracts. Yet the authorities recognize the right of such persons to arbitrate incidental or collateral questions of fact which do not go to the essence of the contract and which are only intended as an aid and guide to the courts in any litigation arising out of the contract for the purpose of settling in advance some particular fact or facts so as to furnish evidence of it at the trial which the litigants are not at liberty to dispute.

The distinction between executory agreements of arbitration which oust the courts of jurisdiction and those which are sustained as the sole remedy between the parties, is carefully drawn and fully discussed in *Delaware & H. Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, which is the leading case on that question.

"But the better rule seems to be that a court of equity will secure to either party the benefit of such clauses in a lease, and that, even in the face of the rule against the specific performance of an agreement to submit to arbitration, when the arbitration has failed the court may make the appraisement itself or direct it to be done by its own officer and thereafter enforce performance of the contract upon the terms so found": 24 Cyc., p. 1006, and authorities cited.

Under facts similar to those in the case at bar, the same rule is announced in *Kaufmann* v. *Liggett*, 209 Pa. St. 87, 102 (58 Atl. 129, 134, 103 Am. St. Rep. 988,

67 L. R. A. 353), in which the court says, on page 999 of the opinion in the last-named report:

"The court has complete jurisdiction in equity to fix the amount of the rental to be paid by the lessees during the extension of five years from April 1, 1903, and to enforce specific performance of the agreement providing for such extension."

4. The arbitration clauses in the lease before us were not of the essence of the contract, but mere incidents or collaterals which defined the minimum amount of the rent and purchase price for the last five-year period and provided how and by whom the increase thereof, if any, should be determined. The lease and option was a fully executed contract without either of the arbitration clauses. Under the facts shown by the record in the instant case, we hold that a court of equity did have jurisdiction to ascertain and determine the amount of the rental to be paid under the lease during the last five-year period, and to enforce a specific performance of the agreement providing for the appointment of an arbitrator. The rule is well settled in this kind of a case that where a court of equity has acquired jurisdiction for one purpose it has authority for all purposes, and may render a decree for the amount of accrued rent.

Elrod claims that he assigned the lease to Beeman and by reason thereof is released from any further liability after the date of the assignment. The lower court found that the assignment was not made in good faith and that it was in fact a fraud for the sole purpose of relieving Elrod from further liability. As the facts appear of record, this question becomes immaterial. The lease was executed on March 29, 1906, and the assignment to Beeman was made on or about June 1, 1916. By the terms of the lease the

rental was to be paid in advance; hence on March 29, 1916, another $1,200 as accrued rental became due and payable. The decree of the lower court was for three years' rent, unpaid taxes and accrued interest, amounting to $4,608. Under the terms and provisions of the contract, the lessee promised and agreed to pay the stipulated rental, and by virtue of his assignment Elrod became in privity with and liable for the amount of such rental and would continue to be liable so long as he held under his assignment, and under the terms of the lease a full year's rental was due and payable in advance on March 29 of each year. For such reason it is unnecessary to decide in this opinion as to the validity or the force and effect of the assignment from Elrod to Beeman.

It is also claimed that Beeman was a necessary party to the suit. The arbitrators were appointed by the court upon the application of the plaintiffs and they found that the plaintiffs were not entitled to any increase of rent or the stipulated amount of the purchase price. If the assignment was valid and the arbitrators had increased either the rental or purchase price, there might be some merit in the contention that Beeman was a necessary party, but under the findings of the arbitrators, if the assignment was valid the plaintiffs could collect only the minimum amount of the rent stipulated in the lease.

After careful consideration we are of the opinion that the decree of the Circuit Court must be affirmed.

AFFIRMED.

McBRIDE, C. J., and BEAN and BENSON, JJ., concur.

Submitted on briefs on motion to dismiss appeal July 30, conditionally dismissed July 31, 1917.
Argued on merits October 10, modified and affirmed October 25, 1918.

HODGSON *v.* MARTIN.

HODGSON *v.* CURTIN, EXECUTOR.

(166 Pac. 929; 175 Pac. 671.)

Appeal and Error—Deposit in Court to Avoid Forced Sale—Assignment of Deposit.

1. Plaintiff cannot appeal from a decree declaring a lien on land in his favor, and permitting appellee to deposit with clerk of lower court money awarded so as to avoid forced sale of appellee's land if he assigns his interest in deposit to the surety on his appeal bond as indemnity, since he has no right to money deposited until he accepts it.

Appeal and Error—Bonds—Defect—Correction.

2. Under Section 505, subdivision 4, L. O. L., when party gives required notice of appeal and through mistake omits to file a proper undertaking therefor, permission may be granted to supply defect, and appeal will be dismissed unless that is done.

ON THE MERITS.

Wills—Contract to Devise Land—Construction.

3. A contract to devise land to plaintiff, plaintiff and family to move upon land and board and lodge him, implied a condition that home given would be fairly decent and comfortable, that the food would be suitable, and treatment accorded him kind and respectful.

Specific Performance—Contract to Devise Land—Equitable Relief—Value of Improvements.

4. Where owner of land agreed to devise land to plaintiff in consideration that plaintiff and family would move upon the land and board and lodge him, and plaintiff moved upon land and made improvements thereon, but failed to give owner the comfortable home, good food, and respectful treatment contemplated by the contract, the court, in action for specific performance of the contract, although denying specific performance, will compensate plaintiff for the value of the improvements made, making such sum a lien upon the land.

[As to specific performance of contract to make a will, see note in **Ann. Cas.** 1914A, 399.]

From Douglas: JAMES W. HAMILTON, Judge.

In Banc.

Respondent moves to dismiss appeal. Appeal conditionally dismissed.

Mr. George Neuner, Jr., and *Mr. Carl Wimberly,* for the motion.

Mr. L. B. Sandblast and *Mr. Albert Abraham, contra.*

MOORE, J.—The defendant commenced an action of forcible entry and detainer against the plaintiffs, who having answered, showing they had no legal defense, filed the complaint herein, in the nature of a cross-bill in equity, setting forth their alleged right to the possession of the demanded premises pursuant to which they had made thereon valuable improvements and furnished the defendant board and lodging amounting in all to $1,500, no part of which had been paid.

The answer herein denies the material averments of the complaint, and for a further defense alleges that the plaintiffs' use and occupation of the land equaled the worth of the improvements thus made and the value of the board and lodging so furnished.

A reply put in issue the allegations of new matter in the answer, and the cause being tried resulted in a decree awarding to plaintiffs, as the value of the improvements, $200 and imposed that sum as a lien on the premises, which were ordered to be sold to satisfy the burden declared. A supplemental decree permitted the defendant to deposit with the clerk of the lower court the money so awarded and thus avoid a forced sale of the land. From the latter decree the plaintiffs appealed. Their undertaking therefor was also subscribed by the American Surety Company, a corporation, to indemnify which the plaintiffs assigned to it all their right to the money so left with the clerk, but this sum was not withdrawn from his custody. The

defendant's counsel move to dismiss the appeal on the ground that the assignment was an acceptance of the fruits of the decree thereby preventing an appeal therefrom.

1. The plaintiffs could have accepted the money thus deposited and relinquished all interest in the subject matter of the litigation. So, too, if the answer had admitted that $200 was due them in any event, and this sum had been voluntarily paid, they could legally have accepted the money without prejudicing their right to an appeal: *Portland Construction Co.* v. *O'Neil,* 24 Or. 54 (32 Pac. 764). The sum so deposited was not freely paid but was coerced by the decree. The plaintiffs' right to the money is not unquestioned for the final determination thus reached may be reversed or modified on appeal, so that their interest in the money may be ultimately lost or diminished and the indemnity undertaken to be given the American Surety Company rendered inadequate or valueless. The failure of the surety company to realize on the assignment in case of a reversal of the decree might not render the undertaking on appeal nugatory. But however this may be, a practice should not be sanctioned which would compel a party against his will to deposit a sum of money for the benefit of the adverse party and then allow the latter to avail himself of the deposit to enable him further to litigate the cause.

2. When a party gives the required notice of appeal and through mistake omits to file a proper undertaking therefor, permission may be granted to supply such defect: Section 550, subd. 4, L. O. L. The plaintiffs having no right to the money so deposited until the sum is accepted by them could not legally assign any interest therein, and this being so the appeal will be dismissed unless within 30 days they execute and serve

a new and sufficient undertaking in the sum originally specified and file the bond in this court.

APPEAL CONDITIONALLY DISMISSED.

Argued on merits October 10, modified and affirmed October 25, 1918.

ON THE MERITS.

(175 Pac. 671.)

Department 2.

For appellant there was a brief over the names of *Mr. Albert Abraham* and *Mr. L. B. Sandblast,* with an oral argument by *Mr. Abraham.*

For respondent there was a brief over the name of *Messrs. Neuner & Wimberly,* with an oral argument by *Mr. Geo. Neuner, Jr.*

McBRIDE, C. J.—This was a suit to enjoin an action of forcible entry and detainer, and to enforce a specific contract to convey a tract of land. Pending the hearing in this court defendant died and J. M. Martin, his executor, was substituted as defendant. The controversy arises out of the following facts.

3, 4. Defendant Curtin was the owner of a ten-acre tract of land in Douglas County, upon which was a small cabin and outhouse, and which was for the larger part uncleared. He was a prospector, a bachelor without family, and being desirous of having some one to take care of him and of his home, inserted an advertisement in the local papers requesting correspondence with that end in view. The advertisement was finally answered by the plaintiff, Thomas Hodgson, and it was substantially agreed by the de-

fendant that if the Hodgsons, Thomas and wife and children, would move on the place and board and lodge Curtin, he would convey to Hodgson the land in question. The particulars as to how and when the conveyance was to be made or to take effect were not originally settled, but a short time after the Hodgsons came upon the place, pursuant to the invitation held out by defendant, it was settled that Curtin should make a will devising to Hodgson the land in question, so that as to the method of conveyance it may be said that the final agreement of the parties was that it should be by will, thus leaving the legal title in the defendant during his lifetime.

The evidence shows that Hodgson, his wife and family, and his brother William, to whom Thomas Hodgson assigned a half interest in the land, came upon the premises and did considerable improvement work, thus increasing the value thereof to an extent variously estimated by witnesses from $200 to $1,000, but found by the court to be $200. The sleeping accommodations became overcrowded, and defendant occupied a bed in an outbuilding with William Hodgson, to whose habits in respect to cleanliness and decency defendant had strong objections. The family consisted of Hodgson, his wife, brother, and four children, and later a fifth child was born, and still later James Bennett, a brother of Mrs. Hodgson, came and lived with the family part of the time. The house consisted of a living-room, kitchen and one bedroom, and a cabin adjoining which was large enough for a bedroom and used as such by defendant and William Hodgson. We are satisfied from the testimony the conditions about the house were very unsanitary and were unbearable to a person of defendant's cleanly habits; that the cooking and board furnished were not

suitable to his condition of health, and that neither Thomas Hodgson nor his wife exerted themselves to make the place a comfortable home for defendant in his old age. This may have been owing to the fact that Thomas Hodgson was partially blind and his wife burdened with the care of a family of young children, or to habits of living that rendered them incapable of appreciating the necessity of cleanly and sanitary surroundings, but from whatever cause the conditions may have arisen we are satisfied defendant was compelled by the conditions above alluded to, to leave the premises and build himself a sleeping-cabin away from the intolerable conditions existing in the place which had been his home. The condition that he was to have a home and board during his lifetime with the plaintiff and his family necessarily implied that the home should be fairly decent and comfortable, and the food purchased should be suitable to his age, health and condition, and that he should be respectfully and kindly treated. As to the first two we do not think they came up to the standard above indicated, and as to the third we think Thomas Hodgson was disposed to quarrel and resent the reasonable remonstrances of defendant as to cleanliness in the household. Giving to the agreement all the definiteness which plaintiff claims for it, and not passing upon the question as to whether it was ever reduced to such certainty that a decree for specific performance could be predicated upon it, we are convinced it was not carried out by plaintiff, Thomas Hodgson, in the spirit in which it was understood by the parties when it was entered into. On the other hand we are of the opinion that plaintiffs' labor upon the lands and the services rendered by him and his wife and others at his request, have considerably en-

hanced the value of the property, and in view of all the circumstances it would be inequitable to allow defendant, or rather his executor, to have the benefit of this improvement without compensation. The court below took this view of the case and fixed the amount of such compensation at $200, making that sum a lien upon the land. We consider this estimate rather below the amount indicated by the testimony and we increase the amount to $300. Neither party will recover costs in this court, and the decree as above modified will be affirmed.

MODIFIED AND AFFIRMED.

BEAN, JOHNS and OLSON, JJ., concur.

Argued July 23, affirmed September 17, rehearing denied November 12, 1918.

MILLER *v.* FISHER.

(174 Pac. 1152.)

Evidence — Writing of Deceased Person — Affidavit of Grantor — Statute.

1. Under Section 790, L. O. L., providing when writings of deceased persons are admissible, in ejectment, *ex parte* affidavit of predecessor in title of all parties, made more than twenty-four years after execution of deed by himself and wife to plaintiffs' immediate predecessor, and five years before institution of action in ejectment, *held* inadmissible.

Ejectment—Evidence—Tax Receipts.

2. In ejectment, payment of taxes on either of the lots involved, by any person, was not evidence upon any disputed fact in the case, so that tax receipts offered by cross-complainants were inadmissible.

Reformation of Instruments—Mistake—Mutuality.

3. A mistake, as in a deed, must be mutual, or a court of equity will not grant relief.

[As to reformation of instruments on the ground of mistake, see notes in 30 **Am. St. Rep.** 621; 117 **Am. St. Rep.** 227.]

Reformation of Instruments—Burden of Proof.

4. In suit to reform contract for mutual mistake, plaintiff has burden to show mistake and its mutuality.

Estoppel—Sale of Land—Correction of Original Plat.

5. Where lots in block of an addition to a city were purchased and conveyed, any subsequent attempt by sellers to correct or amend original map or plat by which lots were indicated was void as to purchaser.

Deeds—Presumption—Acquisition of Title to Land in Plat.

6. In ejectment, defendants cross-complaining for equitable relief, in absence of testimony outside of deeds of cross-complainants' predecessors, it must be assumed predecessors acquired title to lots described in their deeds as such lots appeared on then recorded plat of addition.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2.

In June, 1913, the respondents commenced an action of ejectment against the appellants, in the Circuit Court of Multnomah County, to recover possession of lots 20 and 21 in Block 2 of Park Addition to Albina, in the City of Portland. To enjoin the prosecution of that action the Millers filed a cross-bill for equitable relief, to which the Fishers filed a demurrer upon the ground that there was no equity in the bill. This demurrer was sustained by the lower court and from that decision an appeal was taken to this court (*Miller* v. *Fisher,* 77 Or. 532 (151 Pac. 971), in which an opinion by Mr. Chief Justice MOORE held that the cross-bill stated a cause of suit and the case was reversed and remanded. The Fishers then filed their answer to the cross-bill. After the issues were joined a trial was had, in which it was stipulated to the effect that Anna Augusta Fisher, from whom the defendants deraign title, purchased from James Steel and his wife lots 20 and 21, in Block 2 of Park Addition to Albina on November 30, 1883; that prior to the sale Steel and his wife were the owners of a certain tract of land in

Multnomah County, Oregon, described in the stipulation; that James Steel and his wife, then the owners of said tract, divided the same into blocks, lots, streets and alleys and on September 9, 1882, filed a map and plat thereof in the office of the county clerk of said county, designating the tract so platted and mapped as Park Addition to Albina; that on December 7, 1882, the said Steels executed to Mrs. N. J. Woodruff, through whom the plaintiffs derive title, their certain deed for lot 17 in Block 2 of said addition; that on May 10, 1884, Steel and his wife executed to George Johnson, through whom plaintiffs deraign title, their certain deed for lot 16 in said block of said addition; that on December 16, 1887, the said Steel and his wife executed another and corrected map or plat of said Park Addition, which was duly filed on December 17, 1887; that all such deeds were duly and regularly executed, acknowledged and recorded.

It appears from the above opinion of Mr. Chief Justice MOORE and from the facts disclosed by the record in this case that lots 20 and 21, which were deeded to Anna Augusta Fisher, were and are identical with lots 16 and 17 as the same now appear on the amended or corrected plat filed for record December 17, 1887. At the trial, for the purpose of proving the mistake in the map, the plaintiff offered the *ex parte* affidavit made on May 19, 1908, by James Steel, now deceased, one of the original owners and through whom both parties claim title, and also a number of tax receipts tending to show that for many years they had paid the taxes on lots 16 and 17, and certain other tax receipts tending to show that third parties had for a number of years paid the taxes upon lots 20 and 21. Objections were made to such offers and were sustained by the Circuit Court, which after the trial rendered a decree

in favor of the defendants, from which this appeal is taken. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Edward T. Taggart.*

For respondents there was a brief over the names of *Mr. F. M. Saxton* and *Messrs. White & White,* with an oral argument by *Mr. Saxton.*

JOHNS, J.—1, 2. The deed from James Steel and his wife to Anna Augusta Fisher was executed on November 30, 1883. The *ex parte* affidavit of James Steel was made on May 19, 1908, more than twenty-four years after the execution of the deed, and five years before the action in ejectment was instituted. It would not be evidence of any fact in this case: Section 790, L. O. L.; and neither would the payment of taxes upon either of said lots by any person be evidence upon any disputed fact in this case.

3–5. On November 30, 1883, Anna Augusta Fisher purchased and acquired title to lots 20 and 21 of Block 2 as shown on the original map and plat of Park Addition to Albina filed September 9, 1882. There is nothing in the record which shows or tends to show that as between her and the Steels there was any mistake in the execution of that deed, and a mistake must be mutual or a court of equity will not grant relief. In a suit to reform a contract on the ground of mutual mistake the burden is on the plaintiff to show the mistake and prove that it was mutual: *School District No. 4* v. *Hartong,* 89 Or. 155 (173 Pac. 570). The effect of such conveyance was to vest in Anna Augusta Fisher the title to lots 20 and 21 of Block 2 of Park Addition to Albina and to convey any title which the Steels then had to such lots, and any effort or attempt on their

part on December 17, 1887, to correct or amend the original map or plat by them executed and filed on September 9, 1882, would be null and void as to Anna Augusta Fisher or her heirs.

6. While the deed for lot 17 from the Steels to Mrs. Woodruff, from whom the plaintiffs deraign title, was executed on December 7, 1882, it appears from the body of the deed that it was conveyed as "Lot Seventeen (17) in Block number Two (2) in Park Addition to Albina." The same thing is true as to the Johnson deed, which was executed May 10, 1884, and at the time of the execution of all of these deeds the original plat of September 9, 1882, was then on file and of record. There is no testimony outside of the deeds, and in the absence of such testimony it must be assumed that these parties bought and acquired title to the lots described in their respective deeds, and as the same appear on the then recorded map or plat thereof.

The decree of the Circuit Court is affirmed.

Affirmed. Rehearing Denied.

McBride, C. J., and Bean and Burnett, JJ., concur.

Argued July 26, affirmed October 15, rehearing denied November 12, 1918.

LA GRANDE NAT. BANK *v.* OLIVER.

(175 Pac. 434.)

Landlord and Tenant—Landlord's Lien—Crops of Subsequent Years.

1. Where landlord, by express provision of lease, is given lien upon crops as security for rent, the lien is effectual, not only as regards the crops of the first year, but also as to those raised during subsequent years; the lien attaching when crop is planted.

Banks and Banking—Instructions—Bank's Default in Collection.

2. In action on note, where defendant counterclaimed for proceeds of crop on which rental notes deposited by defendant with plaintiff bank for collection were a lien, and alleged that bank had applied such proceeds to chattel mortgage which it took on such crops, instructions *held* to fairly submit issue of whether the bank had received the rental notes for collection and knew of defendant's lien when it took the chattel mortgage.

Trusts—Landlord's Lien—Collection by Bank.

3. Where landlord placed rental notes in hands of bank for collection and deposited lease giving lien on crops, and the bank subsequently took a chattel mortgage on the crops, the bank upon receiving proceeds of sale of crops took them in trust for landlord.

From Multnomah: ROBERT TUCKER, Judge.

Department 2.

This is an action by the plaintiff against the defendant on a promissory note for $1,700 dated January 30, 1910, upon which there was a credit of $16.33 as of March 27, 1913.

The defendant admits the execution of the note and as a defense and counterclaim alleges that he owned 760 acres of land in Union County, known as the E. W. Oliver farm, which he leased to Frank Cullen for seven years beginning October 1, 1909, taking promissory notes for the amount of each annual rent, each note falling due on October 1st of the respective year of the rental for which it was given, and that the lease, which was in writing, provided for a cash rental of $4,333.50 for the year 1910; for 1911, a cash rental of $3,420, and the same amount for each of the remaining years, to be paid "out of the first moneys received for said year's crops, the said E. W. Oliver to hold a lien upon said crop until such rental is paid." The lease contained certain other provisions as to how the land should be cultivated, and the buildings, fences and improvements kept in repair.

It is also alleged that on March 24, 1911, Oliver placed the rent note due in 1910, that due in 1911 and the written lease with the plaintiff "for collection" and then notified it that the notes were rental obligations secured by the terms of the lease and made a first lien on the crop; that the plaintiff accepted the notes and lease under an agreement that it would use reasonable diligence in the collection of the notes; that at the time of the delivery to the bank there was due on the 1910 note a balance of $616.64, with interest thereon at the rate of eight per cent per annum from October 1, 1910; that the rental note for 1911 was for $3,420 and would become due and payable October 1, 1911, and that after the bank received the notes and the lease for collection purposes it took a chattel mortgage on the 1911 crop to be grown upon the land so leased, to secure a large indebtedness due it from Frank Cullen. It appears from the defendant's answer that on October 6, 1911, the bank received from Cullen and from the Grande Ronde Grain Company $4,109.59, as the proceeds of the 1911 crop grown upon the said lands, and at the time of such receipt there was due and payable on the two rental notes then held by the bank the sum of $4,109.59; that under the terms of his lease with Cullen, Oliver had a first lien on the grain for which the money was received by the bank; that the $4,109.59 was so received in trust for the defendant, to be applied in payment of said promissory notes; but the plaintiff after receiving this money "wrongfully applied the same upon the said chattel mortgage taken in its own favor as above stated" and wrongfully refused to apply it or any part thereof upon the said notes in its hands for collection.

It is further alleged that on January 30, 1913, when the note sued upon by plaintiff was executed, the de-

fendant did not know that the bank had received this money; that an error of $16.33 was made as to the amount, which is the item shown as a payment of March 27, 1913, and that on the latter date there was due from the plaintiff to the defendant the sum of $4,444.25, less $1,683.67, or $2,750.58.

All the material allegations of the further and separate answer are denied by the plaintiff in its reply. The case was tried by a jury which returned a verdict against the plaintiff for $3,538.60, upon which judgment was entered and from which this appeal is taken.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Charles H. Finn* and *Messrs. Emmons & Webster,* with oral arguments by *Mr. Finn* and *Mr. Lionel R. Webster.*

For respondent there was a brief and an oral argument by *Mr. James G. Wilson.*

JOHNS, J.—On a former appeal, in an opinion by Mr. Justice BURNETT, this court held that the facts alleged in the answer constituted a valid defense and counterclaim to plaintiff's cause of action: *La Grande Nat. Bank* v. *Oliver,* 84 Or. 582 (165 Pac. 682), and the question is now presented as to whether the proof sustains such allegations. It is undisputed that the defendant was the owner of, and held the record title to, 760 acres of agricultural land in Union County, Oregon, known as the E. W. Oliver farm; that on October 1, 1909, he leased the farm to Frank Cullen for a period of seven years from that date, at an agreed annual cash rental and that the lease provided that the rental should be "payable on the first day of October of each year respectively, out of the first

moneys received for said year's crops, the said E. W. Oliver to hold a lien upon said crop until such rent is paid, said yearly rentals being evidenced by seven promissory notes of even date herewith."

The lease was executed by both parties and duly witnessed, but was never acknowledged and was not filed or indexed as a lease or chattel mortgage, although it was filed and recorded in the office of the county clerk of Union County on October 4, 1909, at page 588 of Book C of what are known as "Miscellaneous Records." It is also undisputed that on March 24, 1911, Frank Cullen, the lessee, executed to the plaintiff his certain chattel mortgage upon the "growing crop of wheat now sown and growing and to be sown and grown in the spring of 1911, on the farm of Lige Oliver, Turner Oliver and John Smith, situate in the county of Union," to secure one note of $1,500 and five notes of $200 each, all payable six months after date; that said mortgage was duly executed, witnessed and acknowledged, and was duly filed and recorded as such; that on and between August 4 and September 13, 1911, Grande Ronde Grain Company issued to Cullen its certain warehouse receipts, and that on October 6, 1911, in exchange therefor that company gave to the plaintiff its certain check for $5,328.25, which was paid.

The real controversy is over the legal force and effect to be given the clause in the lease by which Oliver was "to hold a lien upon said crop until such rent" should be paid, and whether the plaintiff received the lease and the Cullen notes from Oliver for collection and had knowledge of the terms of the lease at the time it took its chattel mortgage from Cullen.

The court gave the following instructions:

"1. I instruct you, gentlemen of the jury, that if you find from the evidence that the defendant Oliver had

entered into a lease of his land to Cullen, by the terms of which lease he was given a first lien upon the crops to be raised upon the land—and the meaning of the term lien, as used herein, I will hereinafter explain to you—for the payment of the rent thereof, and Oliver placed the lease, together with the notes provided for therein for the rent, with the plaintiff for collection, and informed the bank of the fact that he had and held a first lien upon all of the grain that should be raised upon the leased premises for the years 1910 and 1911 by virtue of the lease to secure the payment of the two promissory notes described in the answer, and informed the bank that the notes were given for the rent of the leased premises; and if you further find from the evidence that the bank accepted promissory notes and the lease with the full knowledge at that time that the defendant Oliver by the terms of the lease had and held a first lien upon all grain that should be raised upon said real property to secure the payment of the notes, and that the bank then and there promised and agreed to and with Oliver that it would use reasonable diligence to collect the promissory notes from Cullen in pursuance of said lease; and if you find from the evidence that the bank so received the notes and the lease for the purpose of collecting the same from said Cullen out of the grain that was raised on the premises during the crop year of 1911, with full knowledge and notice that Oliver by the terms of the lease had a first lien upon the grain so to be raised upon the premises but thereafter took a chattel mortgage on the grain in its favor to secure the payment of a large sum of money which Cullen owed and would owe it, as is alleged in the answer of the defendant, then, in that event, gentlemen of the jury, I charge you as a matter of law that the lien of the defendant Oliver as set forth in said lease would be prior and superior to the lien and claim of the plaintiff bank arising out of its said chattel mortgage or its lien for furnishing funds.

"2. The lien of defendant Oliver is what is known in law as an equitable lien. It is a right of a special nature, over the thing, which constitutes a charge or

incumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable suit and may be sold under a judicial decree and its proceeds applied upon the demand of the person in whose favor the lien exists. This lien is created by the contract of the parties, in this case E. W. Oliver and Frank Cullen, whereby in this contract an intention is sufficiently indicated to make some particular property a security for a debt or other obligation, thereby creating an equitable lien upon the property so indicated; and if the transaction resolves itself into such security, whatever may be its form, it is in law designated and constitutes in equity a lien.

"3. If you find from the evidence that the plaintiff bank was fully aware of Oliver's lien upon the grain, and which grain was afterwards included in its own chattel mortgage, and you further find that the plaintiff bank with this knowledge had and received the money from the sale of the grain, the defendant would be entitled to follow it as far as he could trace it, and has a right to recover for such substituted property, if such you find from the evidence to be, it having been converted into money, and to apply, to the extent of his lien on the crop, on the grain, the cash so derived from the sale of said grain, if so traced, for the reason that in such cases the law implies a promise, or, in other words, a contract on the part of the recipient of money under such circumstances as indicated to you, to pay it to the one to whom it justly belongs; in other words, the money derived from the crop which was impressed by defendant Oliver's lien to the extent of his incumbrance created by the lease.

"4. So that, if you find from the evidence that the bank, as is alleged in defendant's answer, received from Cullen and from the Grande Ronde Grain Company as the proceeds of the sales of the grain grown on said leased premises the sum as set forth by defendant's answer, and that when the plaintiff bank so received that amount it well knew it was the proceeds of the grain so raised, and that the bank further knew that Oliver had a lien for the payment of the two notes, then, in that event, the defendant would be entitled

to realize upon his counterclaim and would be entitled to a verdict at your hands.

"5. The Court: If, gentlemen of the jury, on the other hand, you find from the evidence that the plaintiff bank took possession and custody of the said lease simply as a deposit for safekeeping and not for the purpose of collection, that said bank and its cashier or officers thereof had no knowledge of the contents of said lease at or prior to the securing of the chattel mortgage by it from tenant Cullen, then the bank would not be charged in its dealings and transactions with the said Cullen in reference to its chattel mortgage or its subsequent dealings, furnishing money for the prosecution of his work upon the farm, and without knowledge of Oliver's rights arising under his lease, with any duty other than a reasonable diligence in handling the documents entrusted to its custody. The duty of the bank extends no further than to make proper demand of payment, and in some instances to make protest; and if there were special instructions connected with the deposit, to diligently carry those instructions out. So if it held for collection only these documents, if it duly demanded payment, it is not forbidden to obtain in good faith a preference from the same debtor for a debt arising to itself. In other words, by virtue of this deposit of these notes the bank would not be precluded from dealing with other customers, or the same customer with which Oliver was dealing.

"6. It is incumbent upon the defendant Oliver to bring actual notice to the plaintiff bank, by and through its officers, of his lien, for the reason that the filing or recording of the lien would not be notice, because it has been admitted in the trial of this case that the lease was not acknowledged or recorded so as to impart constructive notice, like that arising from the record of the filing of a mortgage. [To counsel.] Am I not correct in that, gentlemen?

"7. So, that, gentlemen of the jury, if you find from the evidence that the plaintiff bank did not have actual notice of Oliver's lien on said grain by notice of his lease, then no liability could be visited upon the bank

for its failure to recognize Oliver's claim or lien and to apply the proceeds of money coming into the bank's hands and from Cullen or the Grain Company, as the proceeds of the sale of the grain on the leased premises, and your verdict in that case should be for the plaintiff bank.

"8. You are instructed that the defendant must recover, if at all, on his counterclaim, on the strength of his own title to the money received from Cullen as proceeds of the grain, and the burden of proof is upon the defendant Oliver in the particulars above set forth, as I have indicated to you.

"9. I further instruct you that any money received from the proceeds of the grain raised by Cullen upon defendant's land, even though plaintiff knew of the same and paid said money out upon the debts of Turner Oliver, or others, upon the instructions or with the consent of the defendant Oliver, then that would be paying money for the benefit of the defendant herein and he cannot complain thereof; and under such circumstances, if you find that the plaintiff bank did make such payments, then the plaintiff did the same rightfully and you must find for the plaintiff as to those particular sums so paid."

1. While not uniformly so held, yet by the weight of authority and better reasoning,

"It is generally recognized that parties may, by an express provision in the lease, confer upon the landlord a lien upon the crop raised upon the demised premises, as security for the rent": 16 R. C. L., § 489, and authorities cited.

Such a lien is effectual not only as regards the crops of the first year, but also as to those raised during subsequent years: *McCaffrey* v. *Woodin,* 65 N. Y. 459 (22 Am. Rep. 644); *Baxter* v. *Bush,* 29 Vt. 465 (70 Am. Dec. 429); upon the principle that a tenant may transfer a title to crops not then *in esse* but which are to be grown on the land under the terms of the lease, and

the lien will attach when the crop is planted: *De Vaughn* v. *Howell,* 82 Ga. 336 (9 S. E. 173, 14 Am. St. Rep. 162). There is much stronger reason to sustain a lien where the crops are to be grown by the tenant upon the farming lands the record title of which is in the landlord.

2, 3. Under instructions 3, 4, 5, 6 and 7, the question as to whether the plaintiff received the Cullen notes from Oliver for collection and had knowledge of the existence of the lease and of its terms and provisions, at the time it took its chattel mortgage, was fairly submitted to the jury, which found for the defendant in the full amount of his counterclaim. Assuming, as we must for the purposes of this opinion, that the jury found that the plaintiff received the Cullen notes from Oliver for collection and had knowledge of the existence of the lease and its provisions when it took its chattel mortgage, the case comes squarely under the opinion of Mr. Justice Swayne in the case of *Butt* v. *Ellett,* 19 Wall. 544 (22 L. Ed. 183), where it is said:

"The appellants had full notice of the rights of Sillers. They read the lease a few days after its execution. Ellett also notified them of his rights and claim. The cotton went impressed with his lien into their hands. When they sold it they took the proceeds in trust for his benefit and became liable to him for the amount."

So, in this case, when the bank received the check from the Grande Ronde Grain Company for the Cullen grain, it received it in trust for the defendant and became liable to him for the amount.

There is some contention as to the application and appropriation of payments, but that question was fairly submitted to the jury by instruction number 9,

and it appears from the amount of the verdict that the jury found in favor of the defendant on that issue.

The plaintiff took eight exceptions to the charge and requested nineteen different instructions, which were not given except so far as they are embodied in the charge. We are of the opinion that all of the material questions were fully and fairly covered by the instructions of the trial court, and that instruction number 5 was favorable to the plaintiff. While the testimony upon some of the vital points is not strong, the fact remains that under the instructions the jury found for the defendant in the full amount of his counterclaim and that there is some testimony in the record to support the verdict on all of the material issues.

Assuming, without deciding, that the court did err in permitting F. L. Meyers, the plaintiff's cashier and witness, to be cross-examined as to matters tending to establish the counterclaim of the defendant, any such error was cured by subsequent ruling and instructions.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and HARRIS, JJ., concur.

Argued October 3, affirmed November 12, 1918.

ADJUSTMENT BUREAU OF PORTLAND *v.* STAATS.

(175 Pac. 847.)

Bills and Notes—Consideration—Evidence—Sufficiency.

1. In a suit to foreclose a mortgage securing a promissory note, evidence that the proceeds of the note and mortgage were to be applied to defendant's debts, in connection with the presumption of adequate consideration, sufficiently met plea of want of consideration.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Department 1.

This is a suit to foreclose a mortgage on real estate, given to secure the payment of a note of $8,577.37 alleged to have been given to the plaintiff on March 1, 1915, and due on November 1st of the same year.

The answer denies the making or execution of both the note and the mortgage and challenges the complaint in other material particulars. In the new matter, however, the defendants give a long history of their laying out the town of Maupin, stating that they conceived it would be a good business point and accordingly opened a merchandise establishment there and became involved in debt to wholesale dealers when a financial stringency came on as the result of the war in Europe; that they were unable to pay their debts and that the plaintiff, knowing their situation, told them that their creditors, whom the plaintiff represented, insisted upon immediate payment; that one of them was threatening to sue the defendants and if one commenced the others would likely do the same, and that if they would give their note secured by a mortgage for the amount due their creditors it would be so arranged as to extend the time of payment to November 1, 1915. Thereupon, relying upon such representations, they gave the note and mortgage. They contend that the amount of their indebtedness was incorrectly stated in the note. They also contend for reductions in certain items making up the principal of the notes, owing to payments they had made directly to the original claimants. It is further charged that the plaintiff by its officers and agents had thwarted the defendants in their efforts

to sell the business so as to realize enough to pay their debts.

While the pleadings were being made up there were various motions for judgment for want of reply, judgment on the pleadings, motions to strike out pleadings, and the like. All of these were overruled and when the pleadings were finally made up the Circuit Court heard the case and gave a decree against the defendants in the sum of $8,275.72 principal, and accrued interest, together with $400 attorneys' fees, and foreclosed the mortgage. The defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Enoch B. Dufur.*

For respondent there was a brief with oral arguments by *Mr. Herbert R. Dewart* and *Mr. John W. Reynolds.*

BURNETT, J.—We find nothing in the matter of making up the pleadings that is beyond the power of the court under the various statutes allowing amendments and enlarging the time to plead. It is unnecessary to multiply authorities or do more than to refer to Section 103, L. O. L. The attempt to allege fraud is insufficient in that it does not comply with the general rule, the precedents for which in this state were compiled by Mr. Justice MOORE in *Lindstrom* v. *National Life Ins. Co.,* 84 Or. 588 (165 Pac. 675). Neither is it alleged wherein the representations charged in the answer were false.

1. Passing all these matters, however, and arriving at the merits of the case, it is plain that the defendants found themselves involved in debt owing to

their inexperience in the business in which they were engaged; that the creditors were desirous of realizing upon their claims, in pursuance of which the defendants made their note and mortgage to the plaintiff, which is a concern representing creditors in the adjustment of claims against retail merchants. The business ran along from the date of the note until after its maturity and the defendants' claim reductions for various amounts they paid during that time. We are satisfied that they have received credit for all that was justly their due on this account. They do not pretend but that they were in debt for at least the greater part of the amount of the note. The presumption is that the note was given for an adequate consideration. This is reinforced by the testimony, which was that the proceeds of the note and mortgage were to be applied to the satisfaction of the debts of the defendants. All this effectually disposes of the plea that the note was given without consideration. In brief, the defendants are unfortunate in having embarked in an enterprise with which they were not familiar, and in encountering a financial stringency for which no one, especially their creditors, was responsible, but they justly owed the debts. The court treated them fairly and correctly in the settlement of their claims for payments they had made. On the whole case, the decree of the Circuit Court was right and it must be affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued October 9, reversed November 12, 1918.

MILES v. SABIN.

(175 Pac. 863.)

Sales—Conditional Sales—Validity.

1. Conditional sales are valid and binding obligations.

Sales—"Conditional Sales"—"Bailment."

2. The main distinction between a "bailment" and a "conditional sale" is that in a conditional sale there is a promise or agreement to pay, and in a bailment there is no such promise or agreement.

[As to difference between sales and bailments, see note in 2 Am. St. Rep. 711.]

Sales—Conditional Sale—Construction of Contract.

3. Contract between manufacturer and implement dealer, providing "that the terms and conditions of sale apply to all goods which may be ordered," that "nothing in this contract shall release the party from paying the agreed price," and that any notes held by manufacturer should continue to be valid obligations, but that manufacturer should have option to take possession of unsold goods at termination of contract, was a conditional sale contract, and not a contract making implement dealer bailee of manufacturer.

From Linn: GEORGE G. BINGHAM, Judge.

Department 2.

The defendant, John Deere Plow Company, hereinafter referred to as the Plow Company, is an Illinois corporation engaged in the manufacture and sale of farming machinery and duly licensed to transact business in the State of Oregon. The plaintiff is a merchant doing business at Brownsville in this state. On March 2, 1916, plaintiff and defendant entered into a written agreement, known as a general implement contract, under which the Plow Company promised to furnish goods, wares and merchandise to the plaintiff until November 1st of the same year, on the terms and conditions therein stated. The contract provides:

"First.—The terms and conditions of sale herein set forth apply to all goods ordered herein, and to all subsequent orders, whether given by mail, telephone, telegram, verbally or otherwise, during the life of this contract, which is to remain in force and effect until November 1, 1916, and shall apply to all orders given and accepted subsequent thereto, until the next annual general implement contract between the parties hereto is made, approved and in effect; it being understood, however, that subsequent orders accepted by the Plow Company shall be governed, as to prices, by the origin of shipment, as shown on the Plow Company's current price list. * *

"Fourth.—It is expressly agreed that the title to and ownership of all goods delivered to and held by the second party under this contract shall remain vested in the Plow Company, unless expressly surrendered by it in writing signed by an officer thereof, and said goods shall be held subject to its order until fully paid for in money. Sales at retail may be made by the second party before payment, but only in the regular course of business, and the second party has no authority to make sales in bulk. Nothing in this contract shall release the second party from paying the agreed price. Notes of the second party or his customers, taken by the Plow Company, are not accepted as payment. * *

"Sixth.—The second party agrees to give his notes, maturing as herein provided, for all goods shipped by the Plow Company, upon receipt of same or on any subsequent date, at the option of the Plow Company, and whenever requested by the Plow Company said second party shall deliver to the Plow Company proceeds of sales held by said second party as hereinbefore provided, amounting to twenty per cent (20%) in excess of the amount of notes given by the second party."

Among other things, the eighth clause provides that at the termination of the contract the Plow Company has the option to take possession of any unsold

goods, and credit the amount of the invoice price thereof upon any notes or accounts of the plaintiff, and that the plaintiff shall be liable to the Plow Company for any depreciation in the value of the goods, the amount of such depreciation to be determined by the Plow Company. "Any note or notes held by the Plow Company shall continue to be a valid obligation of the second party for the amount of such depreciation."

In the placing of an order for goods the plaintiff signed the following specially prepared written application:

"John Deere Plow Company of Portland, Oregon,
"Portland, Oregon.

"Please ship goods specified in the within list, as per instructions and conditions contained herein, on or about —— AT ONCE ——, 191—, or as soon thereafter as possible, for which I agree to pay according to prices, terms and conditions stated herein, based on delivery f. o. b. Portland, except on such goods as are priced f. o. b. factories.

"It is understood that the prices named herein apply to this order only, and are subject to change without notice, and clerical errors in prices herein entered may be corrected by the Plow Company before approval.

"The Conditions of Agreement, Notices and Warranty as they appear on pages 3–4–5–6–7 hereof are made a part of this contract, and this order is given subject thereto.

'STRUBLE MILES."

Such an order was always subject to the approval of the Plow Company.

After the execution of such contract and pursuant to its terms, the plaintiff placed certain written orders with the Plow Company and on May 17, 1916, executed to it his certain promissory note for $249.95,

payable July 15, 1916, with interest at 8 per cent per annum from maturity, and a certain other promissory note for $90, payable August 15, 1916, with like interest, in each of which it was provided that in the event of suit or action he would pay reasonable attorneys' fees, the amount of the notes corresponding with the respective amounts of charges for merchandise which was shipped to the plaintiff pursuant to his written application. Thereafter, before July 31, 1916, the Plow Company under the terms and provisions of the contract furnished to the plaintiff merchandise to the amount of $73.91, for which the plaintiff did not execute his note.

The notes and account were assigned to the defendant Sabin for collection, and for failure to pay he commenced an action against the plaintiff here in the Circuit Court of Linn County, to recover the amount of the notes, attorneys' fees and the account. To defeat the action, the plaintiff filed his complaint in equity against the defendants, claiming in legal effect that he had never purchased any goods, wares or merchandise from the Plow Company, and that the facts made and constituted the plaintiff a bailee of the Plow Company for all of the goods which were shipped and delivered to him under the contract; that the notes were without consideration, and asking for a decree enjoining the prosecution of the action at law and for an accounting between himself and the defendants.

The defendants filed an answer in which they set forth and allege the terms of the written contract and the placing of the written orders, and claim that under the facts such transactions were conditional sales and that, the conditions having been waived, the plaintiff is now liable as a purchaser.

The only question to be determined on this appeal is the legal force and effect of the written instruments under consideration. The trial court found that under such instruments the plaintiff was the bailee of the Plow Company, enjoined the prosecution of the action at law and decreed that there should be an accounting between the plaintiff and the defendants. From this decree the defendants appeal.

REVERSED.

For respondent there was a brief submitted over the *Messrs. Cake & Cake* and *Messrs. Angell & Fisher,* with oral arguments by *Mr. William M. Cake* and *Mr. Homer D. Angell.*

For respondent there was brief submitted over the names of *Messrs. Weatherford & Weatherford* and *Mr. E. F. Bailey.* No appearance for respondent at the hearing.

JOHNS, J.—It is conceded that the Plow Company shipped merchandise to the plaintiff to the value of the notes and the open account; that the merchandise was ordered and received and the notes were executed by the plaintiff under the terms and provisions of the written contract. The purpose and intent of the contract on the part of the Plow Company is very apparent, and the plaintiff as one of its former salesmen was familiar with the terms and conditions of the agreement. The contract was intended to protect the Plow Company in dealing with its customers who were entitled to a limited credit only.

"It goes without saying that if there are in the contract inconsistent provisions, some of which indicate that the title was reserved and some that the title passes, the dominant thought must be ascertained and

given effect, regardless of any formal contrary statement": *John Deere Plow Company* v. *Mowry,* 222 Fed. 1–5 (137 C. C. A. 539, 543).

"Whether the transaction is a conditional sale depends not upon the name given it by the parties, or the form of the instrument evidencing it, but upon the ruling intention of the parties, gathered from all the language of the contract": *McDaniel* v. *Chiaramonte,* 61 Or. 403–407 (122 Pac. 33, 35).

The contract provides, "that the terms and conditions of sale apply to all goods which may be ordered"; that "nothing in this contract shall release the party from paying the agreed price"; that the plaintiff agreed "to give his notes for all goods shipped by the Plow Company upon receipt of shipment"; and that any notes held by the Plow Company should continue to be valid obligations. The written order for the goods provides, "for which I agree to pay according to prices, terms and conditions" therein stated. All of this clearly implies that it was the purpose of the contract that the plaintiff should be and become liable as a purchaser; that the remaining provisions were designed for the protection of the Plow Company, and that for such purpose the title to the merchandise ordered and shipped should be and remain vested in the Plow Company until the purchase price was fully paid.

1, 2. While there is a sharp conflict in the authorities as to what is a bailment and what is a conditional sale, yet in this state conditional sales are held to be valid and binding obligations. This rule was first announced in the case of *Singer Mfg. Co.* v. *Graham et al.,* 8 Or. 17, 23 (34 Am. Rep. 572), and is followed and approved by *Landigan* v. *Mayer,* 32 Or. 245 (51 Pac. 649, 67 Am. St. Rep. 521); *Schneider* v. *Lee,* 33 Or. 578 (17 Pac. 269); *Herring-Marvin Co.* v. *Smith,* 43

Or. 315 (72 Pac. 704, 73 Pac. 340); *McDaniel* v. *Chiaramonte,* 61 Or. 403 (122 Pac. 33); *Thienes* v. *Francis,* 69 Or. 165 (138 Pac. 490); *Francis* v. *Bohart,* 76 Or. 1 (143 Pac. 920, 147 Pac. 755, L. R. A. 1916A, 922); and *International Harvester Co.* v. *Bauer,* 82 Or. 686 (162 Pac. 856). The main distinction between a bailment and a conditional sale is that in a conditional sale there is a promise or agreement to pay, and in a bailment there is no such promise or agreement.

"It is well settled that in a sale title passes to the buyer, while in an agency title remains in the principal although possession is transferred to the agent": 6 C. J. 1091, § 7.

"In general, provisions that the consignee shall on receipt of the goods, or at some time or times thereafter, pay for all goods received, whether sold or not, and that he may sell to whom he will, at what prices and on what terms he will, are characteristic of a contract of sale, whatever terms may be used in describing it. If it appears that possession of property has been transferred but that a naked title has been reserved merely to secure payment of the price, the contract is a sale, although in the agreement it may be called an agency": 6 C. J., § 1093, and authorities there cited.

The case of *Harkness* v. *Russell,* 118 U. S. 663 (30 L. Ed. 285, 7 Sup. Ct. Rep. 51) is well considered and the rule is there laid down that—

"in the absence of fraud an agreement for a conditional sale of personal property, accompanied by delivery, is good and valid as well against third persons as against parties to the transaction."

3. The question here presented is one between the parties to the contract. The plaintiff received the goods and admits the execution of the notes pursuant

to the terms of the contract, and we construe the contract to be a conditional sale: *McDaniel* v. *Chiaramonte,* 61 Or. 403 (122 Pac. 33); *International Harvester Co.* v. *Bauer,* 82 Or. 686 (162 Pac. 856); *John Deere Plow Co.* v. *Edgar Farmer Store Co.,* 154 Wis. 490 (143 N. W. 194); *Ludvigh* v. *American Woolen Co.* (D. C.), 176 Fed. 145; *Dunlop* v. *Mercer,* 156 Fed. 545 (86 C. C. A. 435); *William W. Bierce, Ltd., a Corp.,* v. *Hutchins,* 205 U. S. 340 (51 L. Ed. 828, 27 Sup. Ct. Rep. 524); *John Deere Plow Co.* v. *Mowry,* 222 Fed. 1 (137 C. C. A. 539). In the case of *Herring-Marvin Co.* v. *Smith,* 43 Or. 315, 331 (72 Pac. 704, 706), this court laid down the rule that:

"Where a party has agreed to purchase and pay for the property, and has or is entitled to possession until default, the seller may have choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price."

This case was cited and approved in *McDaniel* v. *Chiaramonte,* 61 Or. 403 (122 Pac. 33).

We are of the opinion that the plaintiff is liable as a purchaser on the conditional contract of sale, and that there was a valid consideration for the promissory notes and the open account. The decree of the Circuit Court should be reversed and the cross-complaint dismissed. It is so ordered. REVERSED.

McBRIDE, C. J., and BEAN and OLSON, JJ., concur.

Argued October 1, affirmed November 12, 1918.

KEMMERER v. TITLE & TRUST CO.

(175 Pac. 865.)

Frauds, Statute of—Land Contract—Part Performance.

1. Payment by purchaser of $140 on land contract, where purchase price was $750, was sufficient part performance to entitle purchaser to specific performance, though contract did not comply with statute of frauds.

[As to enforcement of contracts because of part performance, see note in 32 **Am. Dec.** 129.]

Vendor and Purchaser — Mutual Rescission — Recovery of Purchase Price.

2. Where contract for sale of land is mutually rescinded, purchaser is entitled to recover purchase price paid.

Vendor and Purchaser—Forfeiture of Payments.

3. Forfeiture provision in land contract may be self-executing, or may merely confer option upon vendor, in which latter event default does not of itself work a forfeiture, and vendor is entitled thereto only after a declaration of forfeiture or some equivalent act or conduct.

Vendor and Purchaser—Forfeiture of Payments.

4. A provision in land contract for forfeiture of payments will not be construed self-executing, unless unequivocal language is used showing plainly and clearly that such was the intention of the parties.

Vendor and Purchaser—Forfeiture of Payments.

5. Stipulation in land contract that, upon purchaser's noncompliance, "deposit shall be forfeited as liquidated damages," is not a self-executing forfeiture clause.

Vendor and Purchaser—Time of Payments—Waiver by Vendor.

6. Where installment land contract provided for forfeiture of payments upon purchaser's noncompliance with contract, vendor, after waiving strict compliance with terms as to time of payment, could not claim forfeiture for default in payment without notifying purchaser of its intention to claim a forfeiture unless he made payment within reasonable time.

Vendor and Purchaser—Abandonment of Contract.

7. Under installment land contract providing for forfeiture of payments upon noncompliance with contract, letter of purchaser stating that he was unable to make further payments, and that he would have to let the land go, was an abandonment of the contract, dispensing with necessity of vendor's giving notice of termination of contract in order to claim forfeiture of payments

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1.

The Gearhart Park Company owned a tract of land which had been divided into lots and blocks. These lots were placed on the market and were being sold through salesmen employed by the Gearhart Park Company. The Title & Trust Company, a corporation, held the property in trust for the Gearhart Park Company and the former executed contracts and deeds for the benefit of the latter. On November 2, 1911, F. L. Kemmerer, the plaintiff, signed an instrument which reads thus:

"Original, Gearhart Park No. 1183
" 'By the Sea.'
"Main Office Corner Fourth and Stark Streets,
"Portland, Oregon, Nov. 2, 1911.
"Application Receipt.

"I hereby agree to purchase lot 4 block 1 Woodland Add. 'Gearhart Park,' in Clatsop County, Oregon, of Title and Trust Company, an Oregon corporation, and promise to pay said Title & Trust Company therefor the sum of $750.00, the purchase price thereof, as follows: $150 with this application, and $10.00 monthly, payable in accordance with the terms of a contract to be issued in lieu of this receipt, until the full sum of said (inserted) 'until first payment of $150.00 is paid bal. as contract' purchase price with interest thereon at 6 per cent per annum payable —— has been fully paid. The ownership of and title to said lot 4 to remain in said Title and Trust Company and not to be conveyed to me until paid for, and then conveyed to me by a good and sufficient deed of bargain and sale form. All taxes and assessments accruing after date of this application to be assumed and paid by me.

"Time is the essence of this agreement, and upon the failure of the purchaser to comply with the terms hereof within —— days from date of the acceptance or approval of this application by said Title & Trust

Company, said deposit shall be forfeited as liquidated damages.

"Received on account of the foregoing $10.00.
"Purchaser: F. L. KEMMERER,
"Address: Seaside, Oregon.
"GEARHART PARK,
"By G. L. REES."

In addition to the ten-dollar payment made at the time the instrument was signed, the plaintiff made payments as follows:

"December 22, 1911, $10.00; January 13, 1912, $20.00; February 16, 1912, $10.00; April 18, 1912, $10.00; September 28, 1912, $20.00; April 8, 1913, $10.00; May 7, 1913, $10.00; June 12, 1913, $15.00; July 14, 1913, $15.00; September 8, 1913, $10.00."

At some time after November 2, 1911, the plaintiff entered into the possession of the premises. He cut a considerable quantity of wood off the property.

Under date of February 7, 1914, the plaintiff, writing from Salem, Oregon, addressed to the defendant a letter which reads as follows:

"I wrote you a month or so ago asking for an extension of time in hopes of being able to make up my back payments on Lot 4, Woodland Park Add. to Gearhart. I find however that I will be unable to do so as I have some unlooked for bills that I have got to pay. I am *up against it* rather hard or would be able to keep this tract, however, I will have to let it go. Thanking you for the fair treatment I have received at your hands,

"I remain,
"Yours truly,
"F. L. KEMMERER."

Soon after receiving the Kemmerer letter the Title & Trust Company was instructed by O. W. Taylor, the president and general manager of the Gearhart

Park Company to cancel the "contract" with Kemmerer, and accordingly the words "Cancelled per letter of O. W. Taylor" were written on the instrument.

Referring to the Kemmerer letter, O. W. Taylor testified thus:

"We considered that this letter waived all of his rights, and he had dropped the question of purchasing entirely as we had had it up with him, and we have cases of that kind often,—not often, but once in a while, by people saying that they waive whatever rights they have to purchase and wish to give it up, and then we take possession of the land and try to sell it if we can.

"Q. Did you make any entry in your book relative thereto?

"A. What I do is to instruct the sales manager to resell the property and our maps are changed showing that the property is not sold and it is open for sale again, and the sales manager is so notified, and the Title & Trust Company the same way."

And again, when asked what was done after the receipt of plaintiff's letter, the witness Taylor stated that:

"We put the property back on the market and opened it for sale again, the same as we would any other property." The property was "later sold to another party * * about some time in July or August."

On January 19, 1915, the plaintiff caused a letter to be written to the defendant and three days afterward he caused a second letter to be sent to the defendant, demanding for the first time that the $140 paid by the plaintiff be returned to him. The defendant refused to return the money and on February 4, 1915, Kemmerer commenced this action for money alleged to have been had and received by the defendant for the

plaintiff. The cause was tried to the court without a jury. The trial court found:

"That, between the 8th day of September, 1913, and the 7th day of February, 1914, plaintiff made no payments whatsoever on said contract, and, on the 7th day of February, 1914, wrote to defendant renouncing and rescinding the said contract and abandoning said above-described real property; that, upon receipt of the said letter of plaintiff so rescinding and abandoning said contract and property, defendant cancelled said contract and declared forfeited all sums theretofore paid thereon by plaintiff."

The Title & Trust Company paid the taxes on the property for the years 1911, 1912 and 1913.

O. W. Taylor, the president of the Gearhart Park Company, testified that "there was a house built upon the property but when I come to look it over after this matter came up I found that it had been moved off to adjoining property." AFFIRMED.

The plaintiff appealed from a judgment for the defendant.

For appellant there was a brief over the names of *Mr. Walter C. Winslow* and *Mr. Sidney J. Graham,* with an oral argument by *Mr. Winslow.*

For respondent there was a brief and an oral argument by *Mr. James L. Conley.*

HARRIS, J.—Apparently a printed or typewritten form had been prepared to be used by salesmen; and the form seems to have been drafted on the assumption that in most cases a deposit of $150 would be paid with each application. However, in the instant case the parties probably adapted themselves to the financial situation of the plaintiff and instead of re-

quiring the payment of the $150 in a lump sum he was permitted to pay this amount as well as the remainder of the price in monthly $10 installments. An examination of the writing discloses that $750 is the purchase price. Every word which refers to the subject at all plainly contemplates the issuance of a contract providing for the payment of the final $600 in monthly installments of $10; and also, the language which was "inserted" in the instrument by the parties permits the plaintiff to make monthly $10 payments "until first payment of $150 is paid." It is obvious, too, that it cannot be said that the "deposit" mentioned at the end of the instrument meant more than the "first payment of $150."

1. The plaintiff contends that the writing does not meet the requirements of the statute of frauds and that "therefore, appellant is entitled to recover money paid thereunder." While it has been decided in *Davis* v. *Brigham,* 56 Or. 41, 47 (107 Pac. 961, Ann. Cas. 1912B, 1340), that the agreement need only be signed by the party charged yet, waiving any conclusion that might be deduced from that precedent, there was nevertheless sufficient part performance to enable the plaintiff to compel specific performance: *Johnson* v. *Puget Mill Company,* 28 Wash. 515 (68 Pac. 867). Moreover, while it is true that the writing is styled an "application," it is also true that this "application" was accepted by the defendant; for the Title & Trust Company not only accepted ten several payments in addition to the first ten-dollar payment but it also permitted the plaintiff to enter into possession of the lot and cut wood and, as we infer from the record, build a house upon the property.

2. The plaintiff earnestly insists that there was a mutual rescission of the agreement; and this conten-

tion proceeds upon the theory that the abandonment by the plaintiff was acquiesced in by the defendant and hence resulted in a mutual rescission. If the agreement was mutually rescinded the plaintiff is of course entitled to maintain this action: *Maffett* v. *Oregon & California Ry. Co.*, 46 Or. 443, 457 (80 Pac. 489); but it must be remembered, however, that as pointed out in *Stennick* v. *J. K. Lumber Co.*, 85 Or. 444, 478 (161 Pac. 97, 166 Pac. 951)—

"declaring a forfeiture for breach of the conditions of a contract is not rescission of the contract. It puts an end to the contract and extinguishes it in pursuance to its terms just as performance extinguishes it. The act of taking possession under a forfeiture clause is not an act of rescission or in avoidance of the contract, but the assertion of a right growing out of it": 13 C. J. 608.

The parties had a right to insert the forfeiture clause in the writing and since the plaintiff does not claim that the stipulation involves a penalty as distinguished from liquidated damages, the defendant is entitled to the benefit of the stipulation for a forfeiture and can retain the money paid to it, unless it can be said that the defendant has lost such benefit by failing properly to exercise its right: *Snider* v. *Lehnherr*, 5 Or. 386, 390; *Holbrook* v. *Investment Co.*, 30 Or. 259, 265 (47 Pac. 920); *Graham* v. *Merchant*, 43 Or. 294, 304 (72 Pac. 1088); *Mitchell* v. *Hughes*, 80 Or. 574, 588 (157 Pac. 965).

3–5. The language found in the forfeiture provision necessarily determines the right of forfeiture. A stipulation providing for the forfeiture of payments may be self-executing: *Maffett* v. *Oregon & California Ry. Co.*, 46 Or. 443, 454 (80 Pac. 489); *Gray* v. *Pelton*, 67 Or. 239, 243 (135 Pac. 755); *Potter*

Realty Co. v. *Derby,* 75 Or. 563, 572 (147 Pac. 548); *T. B. Potter Realty Co.* v. *Breitling,* 79 Or. 293, 301 (155 Pac. 179); or the stipulation may do no more than merely to confer an option upon the vendor, and in that event a default in paying an installment does not of itself work a forfeiture, but there must be a declaration of forfeiture or some equivalent act or conduct: *Graham* v. *Merchant,* 43 Or. 294, 304 (72 Pac. 1088); *Higinbotham* v. *Frock,* 48 Or. 129, 131 (83 Pac. 536, 120 Am. St. Rep. 796); 13 C. J. 608. A provision for the forfeiture of payments will not be construed to be self-executing unless unequivocal language is used showing plainly and clearly that such was the intention of the parties: 39 Cyc. 1384. The instrument involved in the instant case does not contain a self-executing forfeiture clause; nor do we understand that the defendant claims that a default in the payment of a monthly installment *ipso facto* works a forfeiture.

In the writing now being examined it is said that "time is the essence of this agreement." While it is true that a blank space appears before the word "days," it is nevertheless obvious that the parties understood that Kemmerer was to make the "first payment of $150" in monthly installments of $10 and that they intended that time was to be of the essence of the agreement to pay such monthly installments. As already stated, the word "deposit" manifestly includes no more than the "first payment of $150." It must be noted that the writing does not provide for the forfeiture of any moneys except the "deposit"; and it must also be remembered that the writing contemplates that when the "first payment of $150" is made a contract is to be issued in lieu of the "application receipt," and the remaining $600 of the

purchase price is to be paid in monthly installments "in accordance with the terms" of the contract to be issued. The record is silent as to the terms of the contract "to be issued." In other words, the purchase price of $750 is payable in part in accordance with the "application receipt" and in part in accordance with the terms of a contract to be issued. The first $150 is payable according to the terms of the "receipt" and the final $600 in accordance with the contract to be issued. Although the final sum of $600 was to be paid monthly yet it was to be paid in accordance with the terms, not of the application receipt, but of a contract not yet issued; and although the "receipt" states that the final $600 is payable in $10 monthly installments nevertheless the duty to commence such payments does not arise until the payment of the first $150 and the issuance of the contract.

6. The right of the defendant to forfeit the "deposit" depends upon the failure of the purchaser "to comply with the terms" of the application; and therefore, while the writing is not easy to construe, it is our opinion that the $140 could not be forfeited except upon default in the payment of the remaining installment due on the "first payment of $150." Although time was made of the essence of the contract, nevertheless the Title & Trust Company waived strict compliance with the terms of the agreement and therefore unless it can be said that Kemmerer waived the right to notice, the Title & Trust Company could not successfully claim a forfeiture of payments made to it, without first notifying the purchaser that it intended to claim a forfeiture unless payment was made within a reasonable time: 39 Cyc. 1382, 1384. It must be remembered that the time for the payment of the

final installment of the purchase price had not yet arrived and since the instant case involves only the failure to make one or more intermediate payments it is to be distinguished from all those cases which involve a final installment and require the tender of a deed: *Reese* v. *Westfield,* 56 Wash. 415 (105 Pac. 837, 28 L. R. A. (N. S.) 956); 39 Cyc. 1376.

7. The plaintiff abandoned the contract: 39 Cyc. 1353. The letter written by Kemmerer on February 7, 1914, was equivalent to saying to the Title & Trust Company: "I abandon the contract and I waive and surrender whatever right I had to insist on additional time or notice of your intention to terminate the contract; notice to me would be an idle ceremony, and since I do not require notice, you may terminate the contract without previous notice." The law does not ordinarily require the doing of a vain thing: *Clarno* v. *Grayson,* 30 Or. 111, 126 (46 Pac. 426). Kemmerer waived and surrendered the right to notice: *Cummings* v. *Rogers,* 36 Minn. 317 (30 N. W. 892); 39 Cyc. 1385; the defendant promptly exercised its right; and there was a termination as distinguished from a pure rescission of the contract: *Stennick* v. *J. K. Lumber Co.,* 85 Or. 444, 478 (161 Pac. 97, 166 Pac. 951); 13 C. J. 608. See, also, *Kennedy* v. *Embry,* 72 Tex. 387 (10 S. W. 88); *Dunlap* v. *Green,* 60 Fed. 242 (8 C. C. A. 600); 39 Cyc. 1384.

The judgment is affirmed. AFFIRMED.

McBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

Argued September 17, modified October 15, rehearing denied November 19, 1918.

COLUMBIA RIVER DOOR CO. *v.* TODD.

(175 Pac. 443, 860.)

Mechanics' Liens—Claim—Validity of Lien—Bookkeeping Errors.

1. Bookkeeping errors resulting in a delivery of more materials than was reasonably necessary to complete the building and a failure to note certain credits for materials returned, when not willful errors but honest mistakes, do not invalidate a lien.

[As to liens for materials furnished to be used, but not in fact used, see note in 64 Am. Dec. 678.]

Mechanics' Liens—Statutes—Failure to Give Owner Statement of Materials Furnished.

2. Failure to mail or deliver statements of materials furnished to owner as required by Section 7416, L. O. L., as amended by Laws of 1915, page 224, rendered nonlienable only those items delivered after May 22, 1915, when amendment became effective; it not being retroactive.

Mechanics' Liens—Amount of Lien—Nonlienable Items.

3. Though some of the items of materials furnished were nonlienable, the subcontractor is entitled to a lien for the lienable items after deducting the credits for returned materials.

Parties—Want of Capacity—Assumed Name—Waiver by Failure to Plead.

4. In action to foreclose mechanics' lien where plaintiff alleged its assignor was doing business under a certain name, defendant's failure to plead noncompliance with requirements of Laws of 1913, page 270, as to doing business under an assumed name, waived any benefit which would otherwise accrue to them because of assignor's noncompliance with the statute.

Mechanics' Liens—Attorney's Fee—Lack of Evidence.

5. In mechanic's lien foreclosure action where there was no evidence as to whether $300 was a reasonable amount to be allowed as attorney's fees, plaintiff's allegation that such sum was reasonable being denied no allowance can be made.

ON PETITION FOR REHEARING.

Trial—Finding of Fact—Stipulations of Counsel.

6. That counsel agree to allow the court to determine attorney's fees in a lien foreclosure case does not obviate the necessity of introducing evidence upon which the court may base a finding as to an issue of fact.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1.

This is a suit to foreclose a mechanic's lien. The complaint alleges, substantially, that G. A. Morrison, doing business under the name of "G. A. Morrison Lumber Company," at the special instance and request of E. P. Preble, contractor and agent of the defendant W. F. Todd, owner of the land, sold and delivered certain building materials, consisting of lumber, hardware, paint, doors and mirrors, to be used in, and which were used in the construction of two certain buildings; that the reasonable value of the materials so furnished and used in the construction of the buildings is $1,145.85, no part of which has been paid. Then follow allegations of the filing of the lien, the assignment thereof to plaintiff, the allegation that $200 is a reasonable attorney's fee for the foreclosure, and a prayer for the relief sought.

The owner of the premises, W. F. Todd, filed an answer, challenging the right of plaintiff to recover upon the grounds, (1) that the notice of lien was not filed within the statutory time after the completion of the buildings; (2) that prior to the delivery of any materials this defendant posted notices upon the premises that he, the owner, would not be responsible for any labor or materials used in the construction of the buildings; (3) that this defendant was never furnished with any invoices of any materials furnished for use in such buildings or any copies thereof, and was never notified by the G. A. Morrison Lumber Company of the furnishing of any materials or given any authority to so furnish them, until long after he had settled with his contractor. These allegations are followed by this averment:

"This answering defendant further alleges that he is informed and has reason to believe and does believe

and therefore alleges that much of the material now sought to be recovered for in this suit was not delivered upon said premises and never entered into the construction of the buildings thereon."

The defendant Markwood filed an answer and cross-complaint wherein he sought the foreclosure of two mortgages upon portions of the premises involved in the controversy and praying that the liens of such mortgages be adjudged prior and superior to that of plaintiff.

Replies having been filed, a trial resulted in a decree dismissing plaintiff's suit and foreclosing Markwood's mortgages. Plaintiff appeals. MODIFIED.

For appellant there was a brief over the names of *Mr. John R. Hughes, Mr. Leslie S. Parker* and *Messrs. Lewis, Lewis & Finnigan,* with an oral argument by *Mr. A. T. Lewis.*

For respondent W. F. Todd, there was a brief submitted over the name of *Mr. Allen R. Joy.*

For respondent William E. Markwood, there was a brief and an oral argument by *Mr. L. E. Crouch.*

BENSON, J.—The trial court failed to make any findings of fact or conclusions of law in this case, and therefore we lack his assistance in determining the credibility of witnesses whom we have never seen or heard, and we are also in the dark as to the legal conclusions upon which the decree was based. We have made a careful review of the evidence, which in many details is conflicting, and from it all, we find the history of the transactions to be about as follows: Early in the spring of 1915, W. F. Todd, the owner of two contiguous lots with an aggregate frontage of 100 feet,

entered into a contract with E. P. Preble, whereby the latter, for a stipulated price agreed to erect three dwelling-houses upon such lots. Preble arranged with G. A. Morrison, who was doing business under the name of the "G. A. Morrison Lumber Company" to furnish materials for the buildings, consisting of lumber, doors, windows, hardware, mirrors, paints and oils. The evidence as to the details of this arrangement is so conflicting that we are unable to say what they were. It is true that defendants introduced in evidence a so-called "estimate" which they claim was Morrison's bid for furnishing all of the materials for one house, and that all three were to be exactly alike as to dimensions and construction. Morrison, however, insists that after his estimate was made, Preble made frequent changes in his plans, and that several estimates were subsequently made, none of which were adhered to. It also appears to be undisputed that one of the buildings was finally completed, with four rooms upstairs, while the other two were not finished above in any manner, not even being floored. It also seems to be established that much more material went into each house than the amount specified in the "estimate." On June 1, 1915, Preble paid Morrison $250 on account and later in the same month, made an additional payment of $350 with the agreement that the total payments, then amounting to $600, would be applied upon the house nearest completion (being known as the "larger house," because it was completed into four finished rooms upstairs), and that the right to a lien upon that building should be waived by Morrison, in order that the owner might negotiate a loan thereon. It is also disclosed by the evidence that the $600 so applied would fully cover all of the material in the structure to which it was applied. The waiver

was executed, the building which had been freed from an impending lien was mortgaged to secure a loan, and on July 12, 1915, the notice of lien which is the basis of this suit was filed, covering the other two buildings. There is some conflict in the evidence as to when the structures were completed, but we think there is a preponderance supporting the conclusion that they were finished after June 12th, and that the lien was filed within the statutory time.

1. The record discloses a number of errors in bookkeeping in regard to plaintiff's claim, resulting in a delivery of more material than was reasonably necessary to complete the buildings and a failure to note certain credits for materials returned, but we find nothing in the record to indicate that these errors were willful or anything more than an honest mistake, and therefore do not render the lien void: *Rowland* v. *Harmon,* 24 Or. 529 (34 Pac. 357); *Grants Pass Trust Co.* v. *Enterprise Min. Co.,* 58 Or. 174 (113 Pac. 859, 34 L. R. A. (N. S.) 395).

2. It is admitted by the plaintiff that no statements of materials furnished were ever mailed or otherwise delivered to the owner of the premises as required by Section 7416, L. O. L., as amended by Chapter 185, Laws of 1915. This amendment became effective May 22, 1915, and not being retroactive in character, it renders nonlienable only those items which were delivered after that date: *Walker* v. *Lanning,* 74 Wash. 253 (133 Pac. 462). It appears from the notice of lien, that materials to the value of $168.60 were delivered after May 22d, and this amount should therefore be deducted from plaintiff's claim.

3. While the evidence is confused and altogether unsatisfactory as to the amount of material actually used

in the two houses, and is practically silent as to what became of the excess, the testimony of experts shows that such materials of the reasonable value of $1,130, were so used. Deducting from this the credits for returned materials, amounting to $39.25, and the non-lienable items delivered after May 22d, amounting to $168.60, leaves the claim valid for the sum of $922.15, for which, under authority of *Portland Floor Co.* v. *Spaulding Logging Co.,* 64 Or. 316 (130 Pac. 52), plaintiff is entitled to a decree.

Defendants urge that the failure of the plaintiff to allege and prove a compliance by the G. A. Morrison Lumber Company with the requirements of Chapter 154, Laws of 1913, in regard to doing business under an assumed name, is fatal to plaintiff's right of recovery.

4. The complaint specifically alleges that Morrison was doing business under the name of "G. A. Morrison Lumber Company," but no defendant saw fit to raise an issue thereon either by demurrer or answer, and any advantage which might otherwise have been taken thereof is thereby waived: *Beamish* v. *Noon,* 76 Or. 415 (149 Pac. 522); *Schucking & Co.* v. *Young,* 78 Or. 483 (153 Pac. 803).

5. The complaint alleges that $300 is a reasonable sum to be allowed as an attorney's fee for foreclosing the lien, and this averment is denied by the answer. No evidence was offered upon the issue so joined, and therefore nothing can be allowed thereon: *Guernsey* v. *Marks,* 55 Or. 323 (106 Pac. 334).

It follows that a decree should be entered here foreclosing plaintiff's lien in the sum of $922.15, and giving such lien priority over the two mortgages of the defendant Markwood, plaintiff to recover its costs and

disbursements in the lower court, neither party to recover costs in this court. It is so ordered.

MODIFIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Denied November 19, 1918.

PETITION FOR REHEARING.

(175 Pac. 860.)

On petition for rehearing. Denied.

Mr. John R. Hughes, Mr. Leslie S. Parker and *Messrs. Lewis, Lewis & Finnigan,* for the petition.

Mr. Allen R. Joy and *Mr. L. E. Crouch, contra.*

BENSON, J.—6. In the original opinion herein occurs the following language:

"The complaint alleges that $300 is a reasonable sum to be allowed as attorney's fees for foreclosing the lien, and this amount is denied by the answer. No evidence was offered upon the issue so joined and therefore nothing can be allowed thereon: *Guernsey* v. *Marks,* 55 Or. 323 (106 Pac. 334)."

This portion of the opinion of the court is challenged by plaintiff in a petition for rehearing, which calls our attention to the fact that in the trial court a stipulation in regard to the matter was entered into as follows:

"Mr. Lewis: I will now ask Mr. Joy if he will stipulate as to attorney's fees?

"Mr. Joy: That has already been gone over and agreed upon.

"The Court: Let us get it into the record formally. Do you agree the attorney's fee may be determined by the court, Mr. Joy?

"Mr. Joy: I do, I always do in these cases. I made that statement before."

It will be observed that nothing is said in this agreement as to the amount of the fee, or as to the introduction of evidence. It is simply stipulated that in this particular the court shall do what the statute says it shall do; namely, to make a finding and decree as to the reasonable amount to be awarded as a fee, and our attention has not been called to any authority supporting the doctrine that such a stipulation obviates the necessity of introducing evidence upon which to base a finding as to an issue of fact.

We might well have added to the citation of *Guernsey* v. *Marks,* 55 Or. 323 (106 Pac. 334), the following cases, all of which announce the same doctrine: *Bowles* v. *Doble,* 11 Or. 474 (5 Pac. 918); *Bradtfeldt* v. *Cooke,* 27 Or. 194 (40 Pac. 1, 50 Am. St. Rep. 701); *Cox* v. *Alexander,* 30 Or. 438 (46 Pac. 794); *First National Bank* v. *Mack,* 35 Or. 122 (57 Pac. 326); *Lassas* v. *McCarty,* 47 Or. 474 (84 Pac. 76); *Wright* v. *Conservative Investment Co.,* 49 Or. 177 (89 Pac. 387); *Waymire* v. *Shipley,* 52 Or. 464 (97 Pac. 807); *Mael* v. *Stutsman,* 60 Or. 66 (117 Pac. 1093); *Satller* v. *Knapp,* 60 Or. 466 (120 Pac. 2).

It is further urged that the ruling in *Guernsey* v. *Marks,* 55 Or. 323 (106 Pac. 334), is not applicable to the case at bar, for the reason that in actions for the collection of promissory notes and the foreclosure of mortgages, the attorney's fees are matters of contract, while in the foreclosure of mechanics' liens such fees are a creature of statute and in the nature of costs. This may be conceded without citation of authority, but the deduction which the learned counsel draws

from this premise does not appear to us to be a logical sequence. It is true that the Supreme Court of California, in *Mulcahy* v. *Buckley,* 100 Cal. 484 (35 Pac. 144), holds that it is unnecessary to allege in the complaint the sums paid for filing and recording the claim of lien, or to aver what is contended for as a reasonable attorney's fee, since the right to recover these is a necessary incident of the judgment, as are costs. This would be true if such items consisted of specific amounts, fixed by statute, as are all other costs in this state, but they do not, and the reasonableness of such a fee is just as clearly an issuable fact as it would be in an action to collect a promissory note which provides for a reasonable attorney's fee. These conclusions are supported by the case of *Sattler* v. *Knapp,* 60 Or. 466 (120 Pac. 2), which was a suit for the foreclosure of a mechanic's lien.

Our attention is called by counsel to two decisions of this court: *Portland Sash & Door Co.* v. *Parker,* 61 Or. 203 (121 Pac. 1135), and *Wills* v. *Zanello,* 59 Or. 291 (117 Pac. 291), which appear to support the contention that litigants may agree that the court may determine the reasonableness of an attorney's fee without the introduction of evidence. It does not appear from the opinions in these cases that the question was seriously presented upon the hearing, and it is not discussed, and it may well be observed that in each of these cases the trial court did make a finding upon the subject, which was affirmed by this court, while in the case at bar, there was no evidence offered and no finding made by the court below, and we are called upon to make a finding upon an issue of fact, without a syllable of testimony upon which to base it. This is contrary to a long line of decisions of this court, and the petition for rehearing must be denied.

REHEARING DENIED.

Argued October 11, affirmed November 19, 1918.

HELTZEL *v.* BAIRD.*

(175 Pac. 851.)

Reformation of Instruments—Mutual Mistake as to Land Reserved.

1. Where defendant, when he purchased interest of vendee's assignee in contract for purchase of land, knew that written contract had been modified by oral agreement so as to reserve a bridge and additional land as part of roadway specified therein, and thereafter a written contract was entered into between him and the vendors which, because of mutual mistake, failed to reserve the bridge and additional land, vendors were entitled to reformation.

Specific Performance—Defense—Shortage in Land Sold.

2. Specific performance of contract to sell twelve acres of land will not be denied vendors because of a shortage of about one tenth or one half of an acre, where the land was not purchased for a specific purpose.

Vendor and Purchaser—Rescission—Grounds.

3. Vendee will not be allowed to rescind because vendors are unable to convey title to one tenth or one half of an acre of a tract of about twelve acres, where land was not purchased for a specific purpose.

[As to remedy of vendee in case of deficiency in quality or quantity, see note in **Ann. Cas.** 1915D, 1108.]

From Marion: GEORGE G. BINGHAM, Judge.

Department 2.

On January 4, 1910, the plaintiffs and James M. Slyter entered into an executory contract for the purchase and sale of about twenty acres of land out of the Jesse Adams Donation Land Claim in Marion County. On December 9, 1910, Slyter sold and assigned to S. W. Cooley and G. W. Small his right, title and interest in the contract. Thereafter it was verbally agreed that Small should relinquish his rights and be released from his obligations; that all of the twenty-acre tract, excepting about 11.87 acres, should

*Authorities passing on the question of vendee's right to rescind contract because of mistake as to extent of grantor's title to land are collated in a note in 15 **L. R. A. (N. S.)** 1039. REPORTER.

be exempted from the written contract and restored to the plaintiffs and that the 11.87 acres should be purchased by the said Cooley in accord with the terms of the written agreement and the verbal modifications thereof. In the original contract a strip of ground only ten feet in width, along the east line of the property, was reserved.

It is alleged that after the execution of the contract it was discovered that the ten-foot reservation was not wide enough to include the bridge located near the northeast corner of the tract; that it was verbally agreed between the plaintiffs and Cooley, who then held the contract, that the reservation therein for roadway purposes should be enlarged so as to include the bridge and the land lying between the northwest end thereof and the county road; that for such purpose it was orally agreed that the reservation for roadway should be twenty feet instead of ten; that it was the intent of the parties to make such reservation wide enough to include the whole of said bridge; that it was then verbally agreed between all of the parties that the bridge and the land on which it was located should be excepted from the premises covered by the contract and considered a part of the roadway; that in August, 1911, while Cooley held the contract, the County Court of Marion County, on the petition of Cooley and others, duly laid out and established said road; that the defendant had knowledge of all such matters when he acquired Cooley's interest in the contract through assignment on September 12, 1914, after which it was verbally agreed between the plaintiffs and the defendant that as a substitute for the original written agreement and the modifications thereof, a new written contract should be drawn, containing the covenants of the original agreement and such verbal

exceptions and modifications thereof, so that such written agreement should clearly specify and define the rights of the parties as modified by such verbal agreements, and that a new agreement was executed, but that through mutual mistake and oversight it did not correctly express or define the actual modified contract between the parties.

The defendant tendered the balance of the purchase price of the property and demanded a deed under the terms of the written contract, and for the failure and neglect of the plaintiffs to execute and deliver a warranty deed conveying to the defendant in fee simple, free of any charge or lien, the whole 11.87 acre tract, including the roadway and the ground upon which the bridge is located, he elected to rescind and commenced an action in which he alleged that the plaintiffs did not have a fee-simple title, and asked for a judgment against them for the moneys paid by him and his predecessors in interest, and the amount alleged to have been expended for improvements, in the aggregate sum of $1,334.58.

To defeat the action, the plaintiffs here filed a cross-bill alleging the above verbal agreements made with Cooley and that there was a mutual mistake in the omission of such verbal agreements from the written contract with the defendant, asking for a decree of reformation, that when reformed the contract should be specifically enforced and that the defendant should be required to pay the balance due on the contract.

The defendant filed his answer to the cross-bill, in which he admits that he purchased Cooley's interest and filed an action for the $1,334.58, but denies all of the material allegations of the complaint and alleges that on or about February 13, 1915, he and the plaintiffs modified the written contract as to the east twenty

feet reserved for road purposes, contending that the plaintiffs should be estopped to claim or assert that any mistakes were made in the execution of the written contract between them.

Testimony was taken in open court before the trial judge, who made findings of fact which in legal effect sustained all of the material allegations of the plaintiffs' cross-bill, and based thereon rendered a decree correcting the description in the contract to conform to the verbal agreements and calling for a specific performance of the contract as corrected. From the decree the defendant prosecutes this appeal.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Walter C. Winslow.*

For respondents there was a brief with oral arguments by *Mr. James G. Heltzel* and *Mr. Roy F. Shields.*

JOHNS, J.—There is a sharp conflict in the testimony. The trial judge heard all of the evidence and in legal effect found that in September, 1914, the defendant personally inspected the tract of land in question; that Cooley pointed out the corners to him; that they passed along the roadway on the east and across the bridge to the county road on the west, then along such county road to the southeast corner of the lands; that it was believed by Cooley and the defendant that the bridge near the northeast corner of the property was within the reservation made for the road; that in August, 1911, while Cooley was the owner of the contract, the County Court of Marion County, based on the petition of Cooley and others, had duly laid out and established the roadway over said lands; that in

the increase of the reserved strip from ten to twenty feet in width it was the intent of all the parties to make such reservation wide enough to include the bridge and the land on which it was located; that the ground between the northwest end of the bridge and the county road should be considered a part of the roadway and reserved and excluded from the contract; that after his examination of the premises and with full knowledge of all such understandings and agreements between the plaintiffs and Cooley, the defendant purchased Cooley's interest in the contract.

It was further found that the original contract having been lost or mislaid, a new contract was drawn between the plaintiffs and the defendant about September 12, 1914, which was intended to carry out the Cooley contract as modified between him and the plaintiffs; that a mistake as to the lands to be reserved and excluded from the 11.87 acre tract was made in the preparation of the contract and that such mistake was mutual between the parties.

The defendant filed an answer in which he admits his purchase of Cooley's interest and the execution of the written contract between himself and the plaintiffs; that he relies upon the terms and conditions of such written contract and that he filed an action in which he sought to rescind and to recover from the plaintiffs $1,334.58, which is the amount of the purchase price and the alleged value of the improvements made upon the property. He further alleges that on February 13, 1915, the contract was modified between the parties, to the effect that in lieu of the east twenty feet reserved for road purposes the plaintiffs should exclude from their deed a strip of land fifteen feet wide off and from the south side of said premises, and that plaintiffs should deed to the defendant on the

completion of the contract a strip of land along the east side of said premises. In the answer the defendant also pleads a breach of the written contract, in that the plaintiffs cannot convey a fee-simple title.

1–3. After a careful reading of the testimony we are convinced that the defendant acquired his interest in the contract with full knowledge of all of its terms as modified by the oral agreement between the plaintiffs and Cooley, and that the defendant was far more interested in rescinding the contract and recovering the money which he had paid and expended on improvements, than he was in obtaining a specific performance of the contract. This is apparent from his own testimony. While it is true that the defendant will not receive the full 11.87 acres, yet it appears from the testimony of the plaintiffs that the amount of the shortage is about one tenth of an acre, and according to the testimony of the defendant, about one half of an acre. It is not claimed that the realty was bought for any specific purpose or that the land embraced within the shortage has any material value for any purpose. In fact, it appears from the record that a portion of it is under water. The defendant relies upon his right to rescind and does not claim any reduction in the price on account of the shortage.

In the written contract between them, executed September 12, 1914, it was agreed that when the defendant complied with the terms and conditions by him to be kept and performed, the plaintiffs would then execute "a warranty deed conveying said premises in fee simple," and there was no provision that the property should be free and clear of any charge, lien or encumbrance. It also appears from the record that the only lien upon the property was a mortgage in favor of the State Land Board and that a release from such mort-

gage was executed and tendered as to the tract in question.

The legal questions here involved are very similar to those in the case of *McCourt* v. *Johns,* 33 Or. 561 (53 Pac. 601), in which the plaintiff sought "a rescission of the bond or contract of sale, for the recovery of part of the consideration paid and for an accounting and recovery of expenditures made in improving the premises," and in which the court denied the relief asked for and rendered a decree of specific performance, holding that:

"The small difference of 3.75 acres in the estimated acreage upon which the amount of the consideration was probably based, is so slight in comparison with the total that it does not lead to a presumption of mistake or fraud; and, none such being pleaded, there could be no relief for this cause. * * That is to say, the purchase was not made for any specific or particular purpose whereby the exact quantity of land estimated to be contained in the tract described became a material element in the transaction."

The trial court heard all of the evidence and rendered a decree in favor of the plaintiffs. We are of the opinion that the decree should be affirmed, without costs to either party on appeal. AFFIRMED.

McBRIDE, C. J., and BEAN and OLSON, JJ., concur.

Submitted on briefs at Pendleton October 28, affirmed November 19, 1918.

BOYER *v.* ANDUIZA.

(175 Pac. 853.)

Executors and Administrators — Powers of Administrator — Lease of Realty.

1. An administratrix entitled to the possession and control of decedent's premises as such may lease them to a third party.

Trespass—Possession.

2. Either actual or constructive possession is sufficient to maintain trespass, although one of the two is necessary at the time of the trespass.

Trespass—Possession by Lessee.

3. The possession of realty by lessee under a lease from an administrator is sufficient to maintain trespass *quare clausum fregit.*

[As to right of one in actual possession of land under color of title to maintain action of trespass against mere trespasser, see note in **Ann. Cas.** 1915D, 37.]

Appeal and Error—Review—Error Favorable to Appellant.

4. Defendant in a suit for trespass cannot assign as error a reduction of recovery against him; such error, if any, being in his favor.

Appeal and Error—Assignments of Error—Sufficiency.

5. Under Supreme Court Rule 12 (173 Pac. x), questions as to evidence or instructions will not be considered unless arising upon the assignments of error.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is an action of trespass *quare clausum fregit.* The cause was tried to the court and a jury resulting in a verdict and judgment for plaintiff. Defendant appeals. AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. Davis & Kester.*

For respondent there was a brief submitted over the name of *Mr. George W. Hayes.*

BEAN, J.—The plaintiff in his complaint claims damages, by defendant's sheep, to the grass, verdure and forage growing on 320 acres of land in Malheur County, during September, 1917.

The defendant denies the complaint, but further pleads that his sheep necessarily passed over the lands from one range to another without doing damage. As stated by the learned counsel for defendant, the case turns upon the question of the plaintiff's possession, actual, or constructive.

Plaintiff leased the lands for the year 1917, of Mrs. Ella Woodruff, the widow and administratrix of the estate of the late owner of which the premises constitute a part. The arrangement for the lease is evidenced by two letters from Mrs. Woodruff, and a canceled check which are in the record. A portion of the rent was paid by plaintiff in the construction of fences on the premises. Mrs. Woodruff in her letter to the plaintiff stated that if she should sell the place before the year was up, she would pay him back, or make it right with him, but there is no evidence tending to show that any repayment had been offered, or that plaintiff had been dispossessed of the land. The land was leased for grazing purposes, the plaintiff residing upon adjoining land. Neither Mrs. Woodruff nor anyone claiming under her is making any claim to the right to the pasture or possession of the land. Plaintiff testifies that he was in possession of the premises in September, 1917, when the trespass was committed. It is contended on behalf of defendant that the agreement between the plaintiff and the administratrix which is the basis of plaintiff's right is insufficient upon which to base constructive possession.

At the close of plaintiff's case in chief, counsel for defendant interposed a motion for nonsuit and at the

close of all the testimony moved the court for a directed verdict in favor of defendant. The refusal to grant these motions are assigned as errors which may be considered together. Under our statute, a formal written lease of real estate for the term of one year is not required: Sections 804, 808, subd. 6, L. O. L.

Section 1185, L. O. L., provides in part that:

"The executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court or judge thereof. * * "

Section 1304, L. O. L., declares as follows:

"The real property of the deceased is the property of those to whom it descends by law or is devised by will, subject to the possession of the executor or administrator. * * "

Where an injury is done to real estate, the administrator and not the heirs is entitled to recover for damages done: *Mast* v. *Sapp,* 140 N. C. 533 (53 S. E. 350, 111 Am. St. Rep. 864. 6 Ann. Cas. 384, 5 L. R. A. (N. S.) 379).

1, 2. Mrs. Woodruff, being entitled to the possession and control of the premises in question as the administratrix of her deceased husband's estate, had the right to transfer the same to the plaintiff, which the evidence shows she did. It is the general rule in America that either actual or constructive possession is sufficient to maintain trespass, although one of these two kinds is necessary at the time of the trespass: 38 Cyc. 1005, 1006, note 91. Whatever right to the possession and use of the land Mrs. Woodruff had was transferred to the plaintiff. In a note to *Beaufort Land &*

Investment Co. v. *New River Lumber Co.*, 30 L. R. A. (N. S.) 243, at page 255, we find the following:

"The occupancy by a widow of land of which she took possession upon the death of her husband, was held in *Byrne* v. *Van Hoesen*, 5 Johns. 66, to be sufficient to enable her to maintain an action of trespass *quare clausum fregit* for entering the close and cutting down trees, on the theory that she is entitled to possession. * *

"A person who contracted with the owner of a close for the purchase merely of a growing crop of grass thereon was held in *Stevens* v. *Adams*, 1 Thomp. & C. 587, to have such an exclusive possession of the close, though for a limited purpose, as to entitle him to maintain an action of trespass *quare clausum fregit* against any one entering the close and taking the grass, even with the assent of the owners of the soil."

3. The possession of the plaintiff pursuant to the authority conferred by Mrs. Woodruff as shown by the record in the case was sufficient to maintain the action of trespass. There was no error in the refusal to grant a nonsuit or to direct the jury to find a verdict for the defendant.

Counsel for the defendant filed a motion for a new trial upon the ground *inter alia* that the damages assessed by the jury, $350, were excessive. The trial court required the plaintiff as a condition to sustaining the judgment to remit $100 of the amount thereof. Defendant assigns such ruling as error. The evidence of the plaintiff tended to show that the damages amounted to $500. Article VII, Section 3, of the Constitution of this State ordains in part that:

"No fact tried by a jury shall be otherwise reexamined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict."

4. If there was any error in reducing the judgment, it was favorable to the defendant and he cannot complain. Upon the trial, defendant offered evidence tending to show title to the premises in question in a third person. Upon this point see 38 Cyc. 1058, note 10. Defendant claimed no interest in the land or the grass thereon. The court rejected the evidence tendered by defendant.

5. The assignments of error in defendant's printed abstract are not based upon any ruling of the court in regard to evidence nor upon any instruction of the court. Under Rule 12 of this court, we are not required to consider such a question unless it arises upon the assignments of error.

Finding no error in the record, the judgment of the lower court is affirmed. AFFIRMED.

Argued October 17, modified November 19, 1918.

STEPHENS v. CITY OF EUGENE.*

(175 Pac. 855.)

Waters and Watercourses—Rights of Riparian Owner—Accustomed Flow.

1. Riparian owner of land, abutting on both banks of a slough, is entitled to have water flow as it is naturally accustomed to flow.

[As to nature of riparian rights and lands to which they attach, see note in **Ann. Cas.** 1913E, 709.]

Eminent Domain—Remedy of Riparian Owner—Injunction—Flowage.

2. Where city constructed power plant, and for operation thereof conducted water from river and discharged it in large quantities into slough, materially increasing the accustomed flow, to the damage of lower riparian owner of land on both banks of slough, such discharge constituted a continual trespass, which riparian owner could have enjoined.

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*Authorities discussing the question of liability of municipality for tort in connection with its waterworks system are collated in notes in 61 **L. R. A.** 58; 25 **L. R. A. (N. S.)** 239; 52 **L. R. A. (N. S.)** 465. On right of upper proprietor in increase quantity of flood water, see note in 41 **L. R. A.** 746. REPORTER.

Municipal Corporations—Trespass—Electric and Waterworks.

3. In the construction and operation of electric and waterworks for profit, the city occupies the same position as a private corporation, organized to buy or sell and get gain, and in the same manner as an individual it is liable, both at law and in equity, for its trespass upon and violation of individual rights.

Eminent Domain—Remedy of Owner—Damages.

4. Where city diverted water from river for operation of water plant, and discharged it into a slough in large quantities, materially increasing accustomed flow, so that lower riparian owner of land on both banks of slough could not ford the slough, as he had prior thereto been doing, and was compelled to go two miles out of his way to reach his plow land, he was entitled to damages.

Eminent Domain — Discharge of Water into Slough — Injunction — Relief.

5. Equity, in action to enjoin city from discharging water used in operation of waterworks into slough, to the damage of lower riparian owner, cannot condemn land for such purposes and fix amount to be paid owner.

From Lane: JAMES W. HAMILTON, Judge.

Department 1.

The plaintiff is the owner of land through which runs a slough originally debouching from the McKenzie River but now closed from that stream, except in floods, by gravel washed in by the water. Before the defendant's advent in the vicinity, at the usual stage on the plaintiff's land the slough carried a flow of about sixteen inches in depth derived from springs and surface water brooks. The plaintiff's buildings are on the north side, and his fields on the south side of the waterway in question. Ordinarily he obtained access to his farm land by fording the slough. He alleges, however, that the defendant constructed on its land above his premises a power plant, to operate which it took out water from the river some miles above, conducted it to the plant and thence discharged it in large quantities into the slough, and has continued and will persist in so doing with the result that it keeps the water continually so high that his ford

has been destroyed; that he has been damaged on account thereof in the sum of $400, caused by the loss of the crossing, compelling him to go about two miles out of his way and through a neighbor's close, to reach his plow land, instead of going directly across the stream, on his own premises. He prays for a decree enjoining the conduct of the defendant thus described and for damages.

The city admits the plaintiff's ownership of the land in question and after denying the other allegations of the complaint except that of its own corporate existence, avers its legislative charter authorizing it to purchase, acquire, maintain, own, manage and operate waterworks, as well as electric and gas lighting systems and to that end has the right to exercise the power of eminent domain for the condemnation of lands. It states its municipal legislation to that end and in substance says it constructed the power plant on its own premises, above the property of the plaintiff, and has engaged in the business of supplying the inhabitants of Eugene with water at rates fixed by the city, as well as electricity for light and power purposes to those who purchase the same. It then makes this averment:

"That said power plant is situated on lands owned by the defendant and that along the southerly line of defendant's premises upon which the power plant is situated, there is a stream flowing westerly which heads some distance easterly from the power plant of the defendant, and flows westerly along the south boundary of the defendant's said premises, and through the premises of the plaintiff and empties into the McKenzie River; that said stream has well-defined banks and channel and is and at all of the times mentioned in the complaint was a well-defined watercourse. The defendant further alleges that in the construction and operation of its power plant as afore-

said, it empties by means of a tail race, the water used in furnishing the power of said plant into the said watercourse and permits it to flow through said watercourse back into the McKenzie River, and the defendant alleges that at no time in the operation of said power plant has it emptied a sufficient quantity of water into said watercourse to raise the water of said stream out of its banks on the premises of the plaintiff, and that at all times the water in said stream has been confined to the bank and channel of said stream as the same passes through the premises of the plaintiff; and that the construction of said power plant and water system was commenced prior to the 1st day of January, 1909."

The reply traverses the new matter in the answer in important particulars and after a trial before the court, findings of fact favorable to the plaintiff in a large measure were filed and a decree was entered to the effect that the defendant be enjoined from diverting the water of the McKenzie River and causing it to flow through plaintiff's real property, but suspended the operation of the decree, provided the defendant should within sixty days from the entry thereof commence proper proceedings to condemn the property of the plaintiff and prosecute the same with diligence. A motion was made on behalf of the plaintiff that the court modify its findings and decree so as to allow the plaintiff the damages which he had suffered on account of being deprived of access to his premises by way of the ford, but this was denied. The plaintiff alone appeals, and complains, in substance, that the court erred in failing to make any allowance as to the amount of damages which he suffered by the destruction of the ford, and further, in substance, that the court was wrong in failing substantially to render a decree condemning the property to the use of the city upon its paying such sum as should be

adjudged reasonable as upon the exercise of eminent domain. MODIFIED.

For appellant there was a brief over the names of *Mr. A. C. Woodcock* and *Messrs. Parsons & Stevens,* with an oral agrument by *Mr. Woodcock.*

For respondent there was a brief and an oral argument by *Mr. O. H. Foster.*

BURNETT, J.—1–3. It clearly appears that the plaintiff is a riparian owner of land abutting upon the slough in question, on both banks thereof. As such, he has the right to have the water flow through his premises as it was naturally accustomed to flow. Without compensation being first assessed and tendered, no one has any right to increase materially the constant flow of the water to the damage of the lower riparian owner. Such action constitutes a continual trespass and properly may be enjoined at the suit of the injured party. It is this principle which is the ground work of cases like *Hallock* v. *Suitor,* 37 Or. 9 (60 Pac. 384), and *Trullinger* v. *Howe,* 53 Or. 219 (97 Pac. 548, 99 Pac. 800, 22 L. R. A. (N. S.) 545), here the court enjoined the use of splash dams which at times let loose upon the stream large and unusual quantities of water which injured lower bank proprietors. That a continual trespass may be enjoined in equity has been decided several times by this court, notably in *Chapman* v. *Dean,* 58 Or. 479 (115 Pac. 156), *Micelli* v. *Andrus,* 61 Or. 78 (120 Pac. 737), and *Stotts* v. *Dichdel,* 70 Or. 86 (139 Pac. 932). In the construction and operation of electric and waterworks for profit the city occupies the same situation as a private corporation organized to buy or sell and get gain, and in the same manner as an individual it is lia-

ble both at law and in equity for its trespasses upon and violation of individual rights.

The defendant contends that it is liable only for consequential damages based upon its negligent and careless operation of its works and in effect, at least, not for the original invasion of the plaintiff's premises. It cites in support of this doctrine, *Fleming* v. *Lockwood,* 36 Mont. 384 (92 Pac. 962, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, 14 L. R. A. (N. S.) 628), *Billings Realty Co.* v. *Big Ditch Co.,* 43 Mont. 251 (115 Pac. 828), *Howell* v. *Big Horn Basin Colonization Co.,* 14 Wyo. 14 (81 Pac. 785, 1 L. R. A. (N. S.) 596), *Lisonbee* v. *Monroe Irrigation Co.,* 18 Utah, 343 (54 Pac. 1009, 72 Am. St. Rep. 784), and *Boulder* v. *Fowler,* 11 Colo. 396 (18 Pac. 337). All of these cases proceed upon the theory that the defendant had lawfully obtained the right to construct and operate the artificial waterway it was using and consequently was liable only for negligence in its management. In *Northwestern Transportation Co.* v. *Chicago,* 98 U. S. 635 (25 L. Ed. 336), it was held that the city was not liable for necessary consequential damages to adjacent property caused by any improvement of its streets, unless the work was negligently done and the damage resulted not from the mere making of the improvement but from the manner in which the work was performed. In this case, however, the defendant does not allege any right lawfully acquired to send down through plaintiff's premises an extra amount of water over what naturally flows there. It simply avows having done so and states that it did not cause the water to overflow the banks of the stream. This, however, is not by the mark, for, as already stated, the plaintiff as a riparian owner is entitled to have the water run there as it was naturally accustomed to. While he

must endure the discomfort which ordinary floods entail, he is not obliged to tolerate an artificial flood continually maintained by someone acting without right.

The defendant also urges that injunction should be withheld because it would deprive the citizens of Eugene of water for domestic purposes, and fire protection and of electricity for illumination and power purposes, and complains that the plaintiff is seeking to enjoin the operation of the municipal power plant. This is not exact in statement, for it is not alleged in the answer that the use of the slough as a wasteway is essential to the operation of the plant, and no facts are stated from which one could deduce that conclusion. The plaintiff seeks simply to enjoin the trespass by which he is denied access to his premises. The case of *Booth-Kelly Lumber Co.* v. *Eugene,* 67 Or. 381 (136 Pac. 29), is not like the instant case. There no direct trespass was committed upon the plaintiff's premises. It claimed to be affected indirectly by an alleged interference with the navigability of the McKenzie River tending to deprive the plaintiff of convenience in floating logs to a waterway leading to its sawmill. In the instant case there is a direct and continuing trespass upon the real property of the plaintiff. It is a usurpation of the rights of the plaintiff by a corporation operating in its private capacity for the purpose of gain at least in part, although incidentally of convenience to the inhabitants of the city. The conduct of the municipality affecting the plaintiff is in violation of its charter, for that instrument authorizes it to acquire property if necessary by condemnation, whereas to all intents and purposes it has appropriated the plaintiff's property without right or compensation. This is as

unjust at the behest of a city as it is by the action of an individual, and should be enjoined. It is not shown that the plaintiff acquiesced in the construction of the plant. As a matter of fact, the testimony shows that he has been continually complaining to the city and trying to get an adjustment of his grievance, but without success. Moreover, as decided in *Hallock* v. *Suitor, supra,* even if the plaintiff had remained quiet and urged no objection, his right would not be prejudiced, because he did not participate in the enterprise in any manner.

4. Incidental to the authority to enjoin a continual trespass is the other function of settling and awarding the damages already suffered by the plaintiff, so as to do complete justice between the parties. The testimony shows that when his ford across the stream was destroyed by the increased flow of water, the plaintiff was compelled to go along a county road paralleling the slough to a public bridge above his premises, where he could cross and come down the south side, through a neighbor's land, in order to gain access to his fields and pasture on the south side. He testifies that the extra labor thus involved was reasonably worth at least $75 per annum covering the six years during which he had suffered this inconvenience. He claims on this account $400, and this seems to be a reasonable estimate of the damage incurred. The Circuit Court was in error in refusing to make a finding and award on this subject.

5. The plaintiff also complains that if the court was of the opinion that the increased flow of water in the slough caused by the action of the defendant should not be interfered with, it should have condemned, in effect, to the use of the defendant the land involved and fixed a price at which the latter could purchase

the same; failing in which, the injunction should be made perpetual. The objection to this is that the pleadings are not sufficient to support a decree tantamount to condemnation. It is not stated that the city wishes to acquire any interest in the premises, nor that it had tried to agree with the plaintiff upon a purchase price and had failed. There is nothing in the pleadings from which we could frame a description of the property which the plaintiff should convey to the city upon payment of the amount to be fixed as in a condemnation proceeding. There is no way by which we can directly compel the city to carry on such litigation or to purchase the property or any interest therein. We can only forbid the trespass and assess the damages already accrued. We cannot, however, rightly go so far as to destroy or impair the granted right of eminent domain which the city derives from its charter. The decree, therefore, will be modified so as to allow the plaintiff damages in the sum of $400 and perpetually to enjoin the defendant from changing the natural flow of the water through the plaintiff's premises, subject and without prejudice, however, to the city's right to condemn the property or such interest therein as it may desire, by an appropriate action at law. MODIFIED.

McBRIDE, C. J., and BENSON and JOHNS, JJ., concur.

Submitted on briefs October 25, modified November 19, 1918.

OLSON *v.* HEISEN.

(175 Pac. 859.)

Master and Servant—Action for Wages Due—Attorney's Fee.

1. Under Laws of 1907, page 313 (Sections 5066–5068, L. O. L.), an employee who has been discharged is not entitled to allowance of attorney's fees; the proviso in Section 3 of the act contemplating payment of attorney's fees only where employee has quit after giving three days' notice of intent to quit.

Statutes—"Purview."

2. The "purview" of a statute is the enacting part or body of the act, as distinguished from other parts, such as the preamble, the title, saving clauses, and provisos.

Statutes—Proviso—Functions.

3. The appropriate function of a proviso is to restrain or modify the purview of a statute in which the proviso is found.

[As to proviso in section of a statute as applicable to other sections, see note in **Ann. Cas.** 1913E, 658.]

Statutes—Conflict Between Purview and Proviso.

4. Since there is a conflict between a part of the purview of Laws of 1907, page 314, Section 3, and the proviso thereof appearing in the same sentence, the proviso must govern.

From Crook: T. E. J. DUFFY, Judge.

In Banc. MODIFIED.

For appellant there was a brief submitted over the name of *Mr. Lake M. Bechtell.*

For respondent there was a brief submitted over the name of *Mr. Jay H. Upton.*

HARRIS, J.—The only question for decision is whether Chapter 163, Laws of 1907, authorized the trial court to allow an attorney's fee in the instant action. The complaint alleges that the plaintiff performed work and labor for the defendant and that the

sum of $300 is due; that the defendant discharged the plaintiff and that thereupon the plaintiff demanded payment of the wages due him, but that the defendant has refused to pay the sum due although a period of more than 48 hours has elapsed. The answer consisted of a general denial. The jury returned a verdict for $300. Upon entering the judgment on the verdict the court included in such judgment an allowance of $75 as a reasonable attorney's fee.

1. Chapter 163, Laws of 1907, consists of three sections and is codified in Lord's Oregon Laws as Sections 5066 to 5068, inclusive. The act is entitled thus:

"An Act to prohibit the issuance of non-negotiable acknowledgments of indebtedness in payment for wages due employees, providing how acknowledgments of such indebtedness shall be paid, fixing the time when certain wages shall become due, and providing for the collection of reasonable attorney's fees in actions to recover wages."

Section 1, in substance, prohibits an employer from issuing any order, check or other acknowledgment of indebtedness on account of wages, unless the paper is made negotiable. Section 2 provides that whenever an employer discharges an employee, all wages earned and unpaid at the time of such discharge, shall become due and payable immediately; and also whenever an employee, not having a contract for a definite period, sees fit to quit his employment, all wages earned and unpaid become due and payable at the time of such quitting if the employee has given three days' notice of his intention to quit.

Section 3 reads as follows:

"In any action for the collection of any such order, check, memorandum, or other acknowledgment of in-

debtedness, or in any action by an employee against an employer for the collection of wages, if it is shown that such order, check, memorandum, or other acknowledgment of indebtedness, or said wages were not paid for a period of forty-eight hours after proper demand for the payment thereof, the court may, in its discretion, upon entering judgment for the plaintiff, include in such judgment, in addition to the costs and disbursements otherwise prescribed by statute, a reasonable sum for attorney's fees for prosecuting said action; provided, such employee shall have given not less than three days' notice of his intention to quit his employment."

2. When we speak of the purview of a statute we mean the enacting part or body of the act as distinguished from other parts of it such as the preamble, the title, saving clauses and provisos: *The San Pedro*, 2 Wheat. 132 (4 L. Ed. 202); Lewis' Sutherland on Statutory Construction (2 ed.), p. 460. In 36 Cyc. 1161, a proviso is said to be

"a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible ground of misinterpretation of it, as by extending it to cases not intended by the legislature to be brought within its purview."

3. The appropriate function of a proviso is to restrain or modify the purview of the statute in which the proviso is found: 36 Cyc. 1162; 26 Am. & Eng. Ency. Law (2 ed.), 678; *State* v. *Young*, 74 Or. 399, 406 (145 Pac. 647). The statute now under discussion makes no reference to the allowance of attorney's fees except in the title of the act and in Section 3. It will be observed that Section 3 consists of a single sentence, and that the proviso constitutes the very end not only of Section 3 but also of the statute con-

sidered as a whole. Looking again at Section 3 it will be seen at once that the words, "In any action for the collection of any such order, check, memorandum, or other acknowledgment of indebtedness," when standing alone, are broad enough to include cases where the employee has been discharged as well as those where the employee has voluntarily quit; and, furthermore, "any action by an employee against an employer for the collection of wages" necessarily includes all such actions. In other words, the purview of the statute, when considered by itself, authorizes the allowance of attorney's fees in all actions to recover wages, if the wages due are not paid within 48 hours after demand. But the purview of the statute is limited by a proviso which declares that "such employee" shall not be entitled to an attorney's fee unless he "shall have given not less than three days' notice of his intention to quit his employment."

The purview states that an attorney's fee shall be allowed "in any action for the collection" of any check, order or acknowledgment of indebtedness on account of wages earned, and that an attorney's fee shall also be allowed "in any action by an employee"; but the proviso, referring among other words, to the words "an employee" in the purview, declares that "such employee" shall not be entitled to an attorney's fee unless he "shall have given not less than three days' notice of his intention to quit his employment." There are no words in the proviso confining its operation to employees who voluntarily quit their employment; but the words "such employee" are as comprehensive as the antecedent words "an employee." In the instant case the plaintiff was discharged and therefore in the very nature of things he could not give notice of an intention voluntarily to

do in the future that which had already been done, compulsorily done it is true, but nevertheless done. The purview therefore embraces all employees; it includes employees who voluntarily quit and those who are discharged. The proviso, however, cannot in the very nature of things include all employees who are discharged because of the impossibility of giving notice of an intention to do what has already been done under compulsion. Hence there is a conflict between the purview and the proviso. It must be remembered that the instant case does not involve a conflict between two or more clauses, sentences or sections of the purview but the conflict is one between a part of the purview and a proviso. It must be kept in mind, too, that we are not called upon to decide what the effect would be if the proviso appeared in a previous section; but the conflict is between the purview and a proviso appearing in the same sentence and in the same section, with the proviso at the very end not only of the section but also of the whole statute. Furthermore, the instant case must be distinguished from all those cases where the purview and a proviso are wholly inconsistent with each other so that the language of one completely neutralizes the language of the other; for here the conflict between the words of the purview and the language of the proviso is only partial. The conflict between the purview and the proviso in Section 3 cannot be harmonized unless we indulge in speculation and hazard the guess that the legislature intended the proviso to apply only to employees who voluntarily quit. While it is true that the intention of the legislature should always be ascertained and made effective if possible it is also true that it is the province of the courts to construe and not to enact legislation. It is impossible to say that

the proviso shall apply only to employees who voluntarily quit their employment without amending Section 3 with another proviso, not now found in the statute, to the effect that the requirement for three days' notice shall not apply to employees who voluntarily quit. If the statute is to be amended it must be done by the legislature and not by the judicial department of our state.

4. Although there may be some contrariety of opinion among the courts as to the rule to be applied where the purview and a proviso are entirely inconsistent with each other, nevertheless the precedents are practically unanimous where there is only a partial inconsistency; and the general rule is that where there is only a partial inconsistency the proviso prevails to the extent of the inconsistency: *Townsend* v. *Brown,* 24 N. J. Law, 80; *Van Horn* v. *State,* 46 Neb. 62 (64 N. W. 365); *Fayetteville Farmers' Bank* v. *Hale,* 59 N. Y. 53; *Campbell* v. *Jackman Bros.,* 140 Iowa, 475 (118 N. W. 755, 27 L. R. A. (N. S.) 288); *Clark Thread Company* v. *Kearny Township,* 55 N. J. L. 50 (25 Atl. 327); 36 Cyc. 1130, 1163; Black on Interpretation of Laws, 278; 2 Lewis' Sutherland on Statutory Construction (2 ed.), § 350. Applying the rule by which we are governed it follows that the proviso in Section 3 must prevail and, therefore, since the plaintiff did not give three days' notice of his intention to quit, the trial court was without authority to allow an attorney's fee. The judgment appealed from will be modified by eliminating the attorney's fee mentioned in the judgment; but on the authority of *Stabler* v. *Melvin,* 89 Or. 226, 232 (173 Pac. 896, 897), it is adjudged that neither party shall have judgment for costs and disbursements in this court. MODIFIED.

Motion to dismiss appeal as to E. W. A. Peake allowed September 11, 1917.

Argued on the merits July 18, affirmed September 17, supplemental opinion filed September 24, rehearing denied November 19, 1918.

LOMBARD *v.* BIETAU.

(167 Pac. 310; 174 Pac. 1165, 1167.)

Appeal and Error—Stipulation—Rule of Court—Oral Argument.

1. In view of Rule 22 of the Supreme Court (56 Or. 623, 117 Pac. xii), providing that all motions, unless otherwise ordered, must be submitted without oral argument, and on printed or typewritten briefs, where the records of the Supreme Court fail to show that any application has been made or order granted permitting oral argument of the motion to dismiss appeals when the cause is heard or at any other time, the attorney's stipulation that the motion be argued in the Supreme Court when the cause is heard on the merits will be disregarded.

Appeal and Error—Acquiescence in Decree—Statute.

2. Under Section 549, L. O. L., providing that any party to a decree other than one given by confession or for want of an answer may appeal, in suit to foreclose a real estate mortgage, where a defendant denied that he had any or claimed to have any interest in the property, also consenting that decree might be rendered on the pleadings against him, his acquiescence having been acted upon, he had no appealable interest in the final decree.

ON THE MERITS.

Mortgages—Invalidity as Between Parties—Mortgage to Self.

3. Mortgage from holder of bare legal title to real and equitable owner as between parties was void, as being equitably a mortgage from equitable owner to himself.

Mortgages—Mortgage to Self—Lien—Assignment.

4. Mortgage made to a real equitable owner of property by his own agent and for his own purposes gave him no lien on property; neither could any assignment thereof convey equitable right to any but innocent purchaser, who can have benefit of it only to extent of claim.

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit to foreclose a real estate mortgage executed by the defendant Wanda Bietau to the plaintiff, B. M. Lombard, on account of which lien there remained due, when this suit was instituted, $1,405 with

interest at six per cent per annum from June 29, 1915. The complaint is in the usual form and alleges that the defendants E. W. A. Peake, Ursula E. Young, George R. Hogshire, and Jane, his wife, have or claim some interest in the real property so mortgaged, but that the estate of either therein, if any, is inferior to the lien of the plaintiff.

The defendants Wanda Bietau and E. W. A. Peake separately answered admitting most of the averments of the complaint, but denying that either of the original defendants had or claimed any interest or estate in the mortgaged premises. Harriet E. Good was subsequently made a party defendant. The defendants Ursula E. Young, George E. Hogshire, and Jane, his wife, though duly served with process, failed to appear or answer, and the default of each was entered of record. Harriet E. Good separately answered, alleging the execution to her by Wanda Bietau of a first mortgage of the premises to secure the payment of $3,750, with interest at seven and one-half per cent per annum from May 29, 1915, to recover which amount a decree was prayed for directing a foreclosure of the latter mortgage and a sale of the real property.

Replies by the plaintiff put in issue the allegations of new matter in the separate answers. The court, on April 25, 1916, upon motion of the defendant Harriet E. Good rendered a decree upon the pleadings against Wanda Bietau and E. W. A. Peake, the latter defendants consenting thereto. The cause was tried and a final decree given November 14, 1916, foreclosing both mortgages but making Harriet E. Good's lien inferior to that of the plaintiff. From this decree she and E. W. A. Peake undertake to appeal. The transcript having been sent up plaintiff's counsel move to dismiss the appeal as to Peake on the ground that he

consented to the decree which was given on the pleadings. The attorneys for the respective parties stipulate that the motion may be argued in this court when the cause is heard on the merits.

APPEAL DISMISSED AS TO E. W. A. PEAKE.

Messrs. Littlefield & Maguire, for the motion.

Messrs. Howland & Nolan and *Mr. Guy C. H. Corliss, contra.*

MOORE, J.—1. Rule 22 of this court reads:

"All motions, unless otherwise ordered, must be submitted without oral argument and on printed or typewritten briefs, copies of which shall be served in the manner and within the time prescribed by Rule 23": 56 Or. 623 (117 Pac. xii).

Our records fail to show that any application has been made or order granted permitting an oral argument of the motion when the cause is heard or at any other time. Such being the case the stipulation will be disregarded.

2. Considering the motion filed in this court the statute so far as involved herein reads:

"Any party to a judgment or decree other than a judgment or decree given by confession or for want of an answer may appeal therefrom": Section 549, L. O. L.

The answer of Wanda Bietau and E. W. A. Peake contains a clause as follows:

"Deny that these defendants or either of them, have or claim to have, any interest in the real property described in said complaint."

It will also be remembered that Peake consented that a decree might be rendered on the pleadings against

him. Such acquiescence having been acted upon he has no appealable interest in the final decree. As to him the motion to dismiss should be allowed, and it is so ordered.

APPEAL DISMISSED AS TO E. W. A. PEAKE.

ON THE MERITS.

Department 1.

This is a suit to foreclose a purchase-money mortgage. In our judgment the findings of the court below are substantially in accord with the testimony, this statement being largely a brief synopsis thereof. On May 28, 1912, plaintiff was the owner of Lots 25 and 26, Brazee Street Addition to the City of Portland, and at about said date he entered into an agreement with E. W. A. Peake to give a purchase-money mortgage on the property for said sum. It was further agreed that if Peake would erect a residence on said property, which should cost not less than $4,750, plaintiff would postpone his mortgage of $1,890 in favor of a building and loan mortgage to be placed thereon by Peake in the sum of $3,750; that at the instance and upon the representations of said defendant E. W. A. Peake, and for the express purpose of enabling the said E. W. A. Peake to float and negotiate said building loan mortgage and obtain and procure the necessary funds to complete said building, plaintiff agreed to execute a conveyance of said property to the defendant, Wanda Bietau, as agent and representative of the said defendant, E. W. A. Peake, and in trust for him and that the defendant, Wanda Bietau, should, simultaneously with the execution of said mortgage of $1,890 to plaintiff, execute a mortgage in favor of the defendant, E. W. A. Peake, in the sum of $3,750,

to be negotiated and sold by the said defendant, E. W. A. Peake, for the purpose of obtaining the necessary funds to build the residence upon said property hereinbefore referred to. That complying with such agreement, plaintiff conveyed the property to defendant Bietau, who executed in favor of Peake a note and mortgage thereon for $3,750, with interest at the rate of 8 per cent, payable May 29, 1915. At the same time defendant Bietau executed in favor of plaintiff her promissory note and a mortgage upon the property for the sum of $1,890 with interest at 6 per cent per annum, payable in monthly installments of $25 each, the first payment to be made August 29, 1912. That on and between August 30, 1912, and September 2, 1914, there had been paid upon the principal sum due on said mortgage $485, and that between August 29, 1912, and June 29, 1915, there had been paid as interest $295.81, leaving due thereon at the date of the decree the sum of $1,405, with interest at the rate of 6 per cent from June 29, 1915. That the defendant, Wanda Bietau, at all times mentioned herein and in holding title to said real property and in executing the various notes, mortgages, deeds and assignments herein referred to, was an agent for the defendant E. W. A. Peake, and acted for him and in his behalf and had and has no right, title or interest in and to said real property, with the exception that she held the legal title thereto as a convenience and for the benefit of the defendant, E. W. A. Peake, and that the said E. W. A. Peake was in truth and in fact the real person in interest and the owner of the property at the time the said mortgage of $3,750 was executed in his favor. That the mortgage executed in favor of the defendant E. W. A. Peake, and the mortgage executed in favor of the plaintiff herein were both executed to carry

into effect the agreement between the plaintiff and the defendant, E. W. A. Peake. That the mortgage executed by the defendant, Wanda Bietau, to the defendant, E. W. A. Peake, was a mere convenience adopted by the parties to enable the defendant E. W. A. Peake to negotiate the mortgage and raise money, and that no money passed between the original parties, and that the said Wanda Bietau did not borrow any money from the defendant, E. W. A. Peake. That the said E. W. A Peake did not negotiate said mortgage to any person for the purpose of procuring a building loan, and that said property belonged to him at the time the defendant Wanda Bietau executed the mortgage to him, and that as between the defendants, Wanda Bietau and E. W. A. Peake and the plaintiff herein, the said mortgage is null and void. That subsequent to the twenty-ninth day of May, 1912, the defendant E. W. A. Peake built a residence upon said premises, but said residence did not cost the sum of at least $4,750, and did not cost over the sum of $4,100. That on or about the fourteenth day of September, 1912, the defendant Wanda Bietau conveyed the real property described in said mortgage and subject to the mortgage executed in favor of the defendant, E. W. A. Peake, and the mortgage in favor of this plaintiff to Ursula E. Young, who is now the owner and holder of the title to said real property. That thereafter, to wit, on July 1, 1914, the defendant, E. W. A. Peake, assigned the mortgage executed in his favor by Wanda Bietau for $3,750 to the defendant, Harriet E. Good, but that said assignment was not placed of record until October 29, 1915, which was after the commencement of this suit by the plaintiff. That the terms and conditions of said mortgage of $3,750 are broken and that said mortgage is liable to foreclosure, for the

reason that said sums of money have not been paid according to the tenor and effect of said note and mortgage, and that said mortgage is now past due and there is due and payable upon said first mortgage the sum of $3,750 with interest thereon from May 29, 1914. That in and by the terms of said promissory note and said mortgage so executed on May 29, 1912, said defendant Wanda Bietau promised and agreed, in the event of foreclosure of said mortgage, she would pay such additional sum as the court might adjudge reasonable as attorney's fees, and that the sum of $225 is a reasonable sum to be allowed by this court as attorney's fees herein. That some time during the year 1914, the defendant E. W. A. Peake borrowed from the defendant Harriet E. Good the sum of one thousand dollars, and thereafter the said E. W. A. Peake assigned to the said Harriet E. Good as collateral security only the said mortgage for $3,750 executed by the defendant Wanda Bietau, in favor of the defendant Peake. That said note for $1,000 executed by the defendant Peake in favor of Harriet E. Good bears date of May 29, 1914, but that said date is not the true date nor was the same executed on that date, and it was not executed before the month of July, 1914. That the defendant Peake is indebted to the defendant Harriet E. Good in the sum of $1,000, with interest thereon at the rate of 8 per cent per annum from July 1, 1914, and that said Harriet E. Good holds as collateral security said Wanda Bietau note and mortgage to secure the payment of said indebtedness. That the defendant Harriet E. Good is entitled to a priority of $1,000 with interest thereon at the rate of —— per cent per annum from July 1, 1914, over the plaintiff B. M. Lombard, and to an attorney's fee in the sum of $100. That the plaintiff Lombard did not agree to extend the time of

any or all of the payments on the mortgage described in plaintiff's complaint, and had no agreement of any kind with the defendant, Ursula E. Young with reference to any extension. That the plaintiff did not accept Ursula Young as the new and principal debtor with reference to the mortgage for $3,750 executed by Wanda Bietau to E. W. A. Peake, and did not accept the defendant Ursula E. Young as a new and principal debtor as to the mortgage of $1,890 executed by the defendant Wanda Bietau to the plaintiff, B. M. Lombard, and that plaintiff did not make any new or different or separate agreement with reference to the time and terms of payment of said note and mortgage of $1,890 with the defendant, Ursula E. Young, but the plaintiff did agree with the defendant, Wanda Bietau that the terms of said payment on said note and mortgage should and would be and were changed from $25 per month and interest to $20 per month and interest.

There was a decree in favor of plaintiff in accordance with the findings, and defendants Peake and Good appeal. AFFIRMED.

For appellants there was a brief over the names of *Messrs. Howland & Nolan* and *Mr. Guy C. H. Corliss,* with oral arguments by *Mr. B. J. Howland* and *Mr. Corliss.*

For respondent there was a brief over the name of *Messrs. Littlefield & Maguire,* with an oral argument by *Mr. Robert F. Maguire.*

McBRIDE, C. J.—3. The deed from plaintiff to Bietau conveyed the bare legal title, the real and equitable ownership being in Peake, and the mortgage from Bietau to Peake was as between them void, being

equitably a mortgage from Peake to himself. By failing to use it for the purposes agreed upon, namely: negotiating it to third parties or a building and loan association to secure money to erect the proposed building, Peake committed a fraud upon plaintiff, of which equity will take cognizance. If Peake had complied with his agreement and erected a building costing $4,750, which would have required the expenditure of $1,000 of his own money in addition to the $3,750 to be borrowed from some building and loan association, he would have been compelled to keep up the payments on the mortgage in order to protect his own investment, and plaintiff's second mortgage would thereby have been safer as a security. But being himself the real party interested in the first mortgage, he could by failure to pay it allow the interest to accumulate until it would actually amount to enough to eat up the whole value of the property and render plaintiff's second mortgage, which was a purchase-money mortgage, wholly worthless as a security. The evidence indicates and the court finds that Peake did not erect a house costing $4,750 as he agreed to do, but built one costing $650 less. Having put less money into the building than was stipulated, it is obvious there would be no reason for him to protect his investment and thereby protect plaintiff's second mortgage.

4. The learned discussion as to merger of the legal and equitable titles has no place here. This is an equitable proceeding and the court is chiefly interested in determining who was the real and equitable owner of the property, rather than who held the bare legal title. Peake was the real owner and the mortgage made to himself by his own agent and for his own purposes gave him no lien on the property, neither would any assignment thereof convey any

equitable right to any but an innocent purchaser. The court found that it had been assigned to Miss Good as security for a loan of $1,000 made to Peake, and while Miss Good's testimony in regard to this is somewhat contradictory, it seems probable that such a loan was made and is yet unpaid. That fact is not questioned by plaintiff, so the case stands in this position; as between plaintiff and Peake and Bietau the mortgage is void. Miss Good being an innocent holder without notice is entitled to the benefit of it to the extent of her claim. This is all that she could exact even if it were perfectly valid as to all parties. It is true, as shown in *King* v. *Miller,* 53 Or. 53 (97 Pac. 542), that an assignee of a chose in action given as collateral may maintain an action in his own name to recover the full amount due upon such collateral obligation, the disposition of the surplus over and above the amount of the claim secured being left to future adjustment between the parties thereto, or in case of disagreement to a court of equity. The case cited was an action at law. Here we have all the parties before the court in an equitable proceeding. Defendant Good is entitled in equity to be paid the amount she has advanced on the faith of the mortgage, because to that extent she is a holder in good faith and equitably the amount of her loan and interest is all she could hold even as against Peake or Bietau. As to plaintiff and Peake and Bietau, the mortgage is void and what would equitably have been the extent of Peake or Bietau's interest had the mortgage been valid, disappears for that reason.

This appears to be in accord with the general trend of the cases cited in the notes to Sections 206, 214, 215, 216 and 218, pp. 999 and 1006, 5 Corpus Juris.

Finding no error in the decree of the Circuit Court it will be affirmed.

AFFIRMED. REHEARING DENIED.

BURNETT, BENSON and HARRIS, JJ., concur.

Supplemental opinion to decision rendered September 17, filed September 24, 1918.

SUPPLEMENTAL OPINION.

McBRIDE, C. J.—In the opinion heretofore filed in this case the writer overlooked the fact that the appeal had been dismissed as to appellant Peake, the opinion upon dismissal having been rendered by Mr. Justice MOORE and appearing in 167 Pac. 310. Peake was therefore out of the case. This fact makes no difference so far as the opinion heretofore rendered is concerned, and is noted so the statement of the case in the opinion rendered September 17, 1918, may conform technically to the fact.

Argued July 24, reversed and remanded October 1, rehearing denied November 26, 1918.

PALMER-HAWORTH LOGGING CO. *v.* HENDERSON.

(174 Pac. 531.)

Attachment—Second Levy.

1. In levying a second attachment, no affirmative or overt act need be done to divest defendant of possession; the property being in the sheriff's possession by reason of a prior attachment not released, or, what is the same thing, having been placed by the sheriff in charge of a deputy who had receipted to him therefor.

Attachment—Second Levy.

2. It is enough for a sheriff in levying an attachment on property of which he, through a deputy, had possession under prior attach-

ment, to forward the papers to his deputy and make return that the property was attached, provided the return shows that he then held the possession.

Attachment—Return—Amendment.

3. Return of attachment may be amended to supply an omission, except when the right of third persons depending on the defective return have intervened, and therefore against one whose claim is that he obtained a right to the property before attachment.

[As to amendment of writs of attachment and of the papers on which they are based, see note in 61 Am. Dec. 125.]

Corporations—Statements and Admissions of Officers.

4. That when credit was extended to the G. Company, and when property was attached, persons who were president, secretary, and general manager both of it and the P. Company, having the same officers and stockholders, pointed out the property as that of the G. Company, is *prima facie* binding on the P. Company in replevin by it against the officer making the attachment, preventing direction of verdict for it.

Replevin—Answer and Evidence—Fraudulent Conveyance.

5. Defendant, in replevin by P., under answer merely denying plaintiff's ownership and justifying detention of the property by virtue of attachment levied by him as sheriff on the property as that of G., cannot show any conveyance by G. to P. was in fraud of creditors.

From Yamhill: HARRY H. BELT, Judge.

Department 2.

This is an action for the possession of personal property, namely: one Tacoma donkey-engine; one Seattle donkey-engine; one steam-log saw, and all lines, blocks, tackle, pulleys and other personal property used in connection with said donkey-engines. The cause was tried to the court and a jury. At the conclusion of the introduction of all the evidence on motion of plaintiff's counsel, the court directed a verdict in favor of plaintiff. Defendant appeals.

The plaintiff alleges that it is the owner and entitled to the possession of the personal property.

The defendant, who is the sheriff of Yamhill County, by his answer, denies the ownership of plaintiff and

justifies the detention of the personal property by him as such sheriff by virtue of attachments under certain writs duly issued in the cases of *Everding & Farrell, a Corporation,* v. *The Gebhardt Lumber Company, a Corporation.*

The reply puts in issue the main allegations of the answer.

The circumstances relating to the several transactions are as follows: The Gebhardt Lumber Company entered into a contract with W. F. Slaughter and J. D. Welch on the twentieth day of August, 1912, for the purchase of certain timber in Yamhill County. The contract was afterward transferred by Slaughter and Welch to Everding & Farrell. On the 12th of April, 1915, Everding & Farrell commenced an action on the contract against the Gebhardt Lumber Company for certain payments and attached certain personal property including that in controversy in this action. Upon the hearing of a plea in abatement in that case, the court found that the payments sought to be recovered were not then due, and on June 18, 1915, dismissed the action and released the property from attachment.

On June 17, 1915, a second action was commenced by Everding & Farrell against the Gebhardt Lumber Company for certain payments then due under the contract, and a second attachment was issued and levied upon the same property. Thereafter, judgment was rendered in the second action for plaintiff in the sum of $800, and for the sale of the attached property.

On the 12th of May, 1916, a third action, between the same parties, was commenced and a third attachment levied upon the property. The present action was commenced May 16, 1916.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. McKenney & Brush, Mr. W. F. Magill* and *Mr. J. Bruce Polwarth,* with an oral argument by *Mr. Magill.*

For respondent there was a brief over the names of *Mr. Frank Holmes* and *Messrs. Joseph & Haney,* with an oral argument by *Mr. Holmes.*

BEAN, J.—1–3. Counsel for plaintiff contend that the return of the sheriff upon the second writ of attachment in the action of *Everding & Farrell* v. *Gebhardt Lumber Company* was insufficient to justify the sheriff, in that the return did not show the manner of making the attachment, or that the sheriff took the property into his possession. Defendant requested the court to be permitted to amend the return to conform to the facts. This application was refused, as we understand the record, for the reason that it was held that the plaintiff's claim had intervened. Plaintiff's counsel also maintained that the facts pertaining to the levy do not warrant the amendment of the return of the sheriff, or show a valid levy.

At the time of the execution of the first writ of attachment on April 14, 1915, the sheriff proceeded with the writ to the lumber-mill and plant of the attachment defendant Gebhardt Lumber Company. Mr. G. D. Palmer, secretary and manager of the Gebhardt Lumber Company, was there and was informed by the sheriff that he was about to attach the property of that company. Mr. Palmer pointed out one of the donkey-engines in question in this action and informed the sheriff where the other donkey-engine was in the woods, and furnished the sheriff with a complete list of all the personal property of that company, and the same was taken possession of by the sheriff as his re-

turn upon the writ in that case shows. It is shown by the evidence that at the time of making the first attachment, the sheriff placed all of the property in charge of one of his deputies Mr. P. A. Flynn, who receipted to the sheriff therefor. The mill was shut down and the business suspended. The receiptor remained in charge and control of the property attached until the trial of this cause. It will be noticed that the first attachment had not been released and the property had not been turned over to anyone by the sheriff or his receiptor when the second attachment was made. Therefore, it was unnecessary for the sheriff in making the second levy under the subsequent writ to do any affirmative or overt act in order to divest the defendant Gebhardt Lumber Company of the possession of the personal property for the reason that the sheriff then held the possession of such personal property: 4 Cyc. 604; *O'Connor* v. *Blake,* 29 Cal. 312; *Naumburg* v. *Hyatt,* 24 Fed. 898; *Tomlinson* v. *Collins,* 20 Conn. 364; *German Sav. Bank* v. *Capital City Oatmeal Co.,* 108 Iowa, 380 (79 N. W. 270); *Turner* v. *Austin,* 16 Mass. 180, 181; *State* v. *Curran,* 45 Mo. App. 142; *Whitney* v. *Farwell,* 10 N. H. 9; *Wehle* v. *Conner,* 83 N. Y. 231; *Bell* v. *Shafer,* 58 Wis. 223 (16 N. W. 628); Waples on Attachment, p. 177; Drake on Attachment (7 ed.), § 267.

A bailee to whom attached property is intrusted by the sheriff is the agent of that officer for keeping it. It is still in the constructive possession of the court, still legally in the hands of the sheriff, by the bailee holding under him as his representative or agent: Waples on Attachment, p. 284; 4 Cyc. 663.

The possession of P. A. Flynn, the sheriff's deputy and receiptor of the personal property attached in the first action, was the possession of the sheriff at the

time of the issuance of the second writ of attachment. The sheriff forwarded the second writ of attachment and other papers to his deputy and made his return that the personal property in question and other property was attached. The possession of the personal property then being in the sheriff's hands, this would have been sufficient if the return of the sheriff had shown that he took or then held the possession of the personal property: *O'Connor* v. *Blake,* 29 Cal. 312. The next question is: "Should the claim of plaintiff to the property involved prevent the amendment to the sheriff's return so as to conform with the facts?" In the absence of statutes expressly authorizing defects in form in the return of a writ of attachment, as a general rule the courts have allowed an amendment of the return to conform to the facts where intermediate rights have not been acquired by third parties: 4 Cyc. 552.

In the case at bar, it appears that the sole stockholders and directors of the Gebhardt Lumber Company were V. Gebhardt, Gus Arndt, and G. D. Palmer, the first named being president and the last named, secretary and manager of the corporation. The Palmer-Haworth Logging Company was organized on the tenth day of March, 1915, with the same stockholders and directors as the Gebhardt Lumber Company. On the same day the articles of incorporation of the Palmer-Haworth Logging Company were executed, the Gebhardt Lumber Company held a special meeting of all the stockholders and passed a resolution to reduce the capital stock from $10,000 to $3,800. Thereafter, on the same day the board of directors of the Gebhardt Lumber Company held a special meeting and by resolution undertook to declare a dividend of $3,000 out of the tangible assets of the corporation, and not having

any money to pay such dividend, but having personal property used in pursuance of the business of the corporation, they resolved that the Gebhardt Lumber Company transfer to its stockholders, and as dividends, the personal property involved in this action. Afterward, on March 30, 1915, the directors executed a bill of sale for this property to the Palmer-Haworth Logging Company, and on the same date that company elected its officers and passed a resolution purporting to purchase this same personal property and issued stock of the corporation in payment therefor. The bill of sale was never placed of record, and the property remained in the same location and to all appearances in the same use and control.

Defendant requested the court to be permitted to amend the return on the writ of attachment in the second and third actions to conform to the facts as shown by the evidence. The court, as stated, refused to allow the amendment and defendant saved an exception. It is stated in 1 Wade on Attachment, Section 151, that:

"The same principles apply to the amendment of a sheriff's return on a writ of attachment, that would govern in any other case of a return on mesne process. * * There seems no good reason why amendment of the return on process of attachment should not be allowed within a reasonable time after judgment, when the rights of third parties have not intervened."

Subject to the restriction noted in the quotation, the sheriff is allowed with great liberality to amend his return so as to remedy defects therein, or make it conform to the facts where the application is made in due time. This is a common-law right, and does not depend upon statutory authority: 32 Cyc. 537; *Main* v. *Lynch,* 54 Md. 658. The return of the sheriff should always be allowed to be amended so as to conform to

the truth unless some new right has arisen in the meantime founded upon the defective return: *Maloney* v. *Simpson,* 226 Pa. St. 479 (75 Atl. 675); *Weaver* v. *Southern Oregon Co.,* 30 Or. 348 (48 Pac. 171).

In the present case, the evidence shows that a valid attachment of the personal property involved was made under the writ. The testimony introduced does not contradict the return of the sheriff, but supplies an omission therein. No new right of third parties based upon the defective return has arisen. The claim to the property made by plaintiff is that they had obtained a right thereto before the attachment. According to its contention, no new right of the Palmer-Haworth Logging Company intervened after the making of the attachment or could be based upon the defective return. The plaintiff alleges in this action that the defendant sheriff is in the possession of the personal property. We think in justice to the defendant and the interested parties, the sheriff should be allowed to amend his return to conform to the facts proven.

4. As to the directed verdict for plaintiff: There was evidence in the case tending to show that Palmer and Gebhardt, the officers of both of the corporations mentioned, informed the parties acting in behalf of, and interested with, the plaintiff in the attachment action, that the personal property in suit was owned by the Gebhardt Lumber Company the defendant in the writ for the purpose of enhancing the credit of that company. There appears to be no difference in the parties interested in the two corporations. For some reason there seems to have been a separation so as to keep the logging business separate from the milling business. When Mr. Palmer who was acting as secretary and manager of both corporations pointed out

to the sheriff with the writ, the engine and other personal property at the time of the attachment, and furnished the officer with an inventory or list thereof, as the property of the Gebhardt Lumber Company, it was in effect a declaration and admission that the property was owned by the Gebhardt Lumber Company, and that plaintiff had no title thereto, and tended to show that there had been no transfer of the personalty in question from the Lumber Company to the Logging Company as claimed by the plaintiff: 4 Cyc. 746. Such property having been attached by the officer as the property of the Gebhardt Lumber Company, the defendant in the writ, the action by the regular acting secretary and manager of the Palmer-Haworth Logging Company is *prima facie* binding upon the latter corporation and estops it from now claiming the attached property as its own: Cobbey on Replevin (2 ed.), § 147. The statements and admissions of both Palmer and Gebhardt, the officers of the plaintiff, which the testimony shows to have been made, tended to support the allegations of the defendant, that the personal property attached was at that time owned by the Gebhardt Lumber Company. It is in evidence that the defendant had no notice of plaintiff's claim until the present action was commenced. The statements made by Gebhardt were partly denied by him. The action by Palmer was attempted to be explained on his part. Any conflict in the testimony was for the jury to pass upon. Therefore, we think the cause should have been submitted to the jury.

5. We concur with the learned trial judge that under the present state of the pleadings the defendant was not entitled to show fraud on the part of the plaintiff, it not being alleged: *Coos Bay R. R. Co.* v. *Siglin*, 26 Or. 387 (38 Pac. 192). Other errors are assigned,

but we notice no question that would be likely to arise upon a new trial which needs further consideration.

The judgment of the lower court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and JOHNS, JJ., concur.

Submitted on briefs September 19, affirmed October 15, rehearing denied November 26, 1918.

HALDEMAN *v.* WEEKS.

(175 Pac. 445.)

Trusts—Enforcement—Right of Action by Cestui Que Trust Against Trustee.

1. A suit by the beneficial owner of mining stock against the trustee holding it must be dismissed, where the answer admits the trusteeship, the trust has not terminated by its terms, and there have been no dividends.

Trusts—Establishment—Evidence—Must be Clear and Convincing.

2. Evidence of plaintiff's beneficial interest in notes *held* not sufficiently clear and convincing to establish a trust.

Gifts—To Parent—Proof—Equity Rule—Applicability.

3. Where the mother in a divorce settlement transfers some of her property to her daughter on the promise of the daughter, then a minor, to reconvey the same when she became of age, such reconveyance a year and a half after the daughter becomes of age does not constitute a gift to the mother, and the rule that requires a parent to prove that the transaction was *bona fide*, free from force, duress or undue influence and not manifest in gross detriment of the child's interest, does not apply.

Infants—Contracts—Ratification After Majority.

4. A minor's contract to deed to her mother lands received from her mother in a divorce settlement is voidable, and is ratified by the daughter deeding such property to her mother after becoming of age.

[As to ratification of contracts by infants after coming of age, see notes in 28 **Am. Rep.** 30; 18 **Am. St. Rep.** 606, 610.]

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc.

This is a suit in equity to secure a reconveyance of certain parcels of realty, and to declare a trust in the proceeds of a $5,000 note executed by the father of plaintiff to defendant, and to secure the possession of certificates of shares of stock in a coal company, and for an accounting for rents and profits on the real estate first mentioned.

In September, 1912, the father of plaintiff was being sued for divorce by defendant. At that time defendant was the record holder of title to a large amount of real estate, and negotiations were on for the settlement of the property rights outside of the divorce proceedings. The father of plaintiff was insisting upon a division of the property, which would give him one half of the real estate, and place the title to the other half in defendant and plaintiff herein. Defendant would not consent to this, and thereupon plaintiff offered defendant, if a settlement were made on the basis agreed upon by the father of plaintiff, that she would as soon as she became of age, deed to her mother her interest in said real estate. Three other conditions of the settlement were, that the then husband of defendant should give a note for $5,000 to defendant, and also turn over two certificates of stock in a coal company, one to said defendant in her own right, and the other to defendant as trustee for plaintiff, and give to plaintiff and defendant the income for five years from a farm near Portland wherein plaintiff and defendant were to be possessed of an undivided one-half interest. This agreement was evidenced by the execution of a formal agreement for the division of the property and the making of deeds to trustee, and after the decree of divorce was granted, conveyances were made and de-

livered and the entire agreement carried out. On May 15, 1914, plaintiff became of legal age, and on or about November 3, 1915, she was married. About two weeks before said marriage plaintiff made and executed deeds to the defendant conveying all of her interest in the real property given by the divorce settlement, which deeds being found defective were destroyed. About three days before said marriage new deeds for the same purpose were executed and delivered. After being married, plaintiff and her husband resided with defendant. On April 1, 1916, plaintiff assigned her interest in an insurance policy on improvements on one of the parcels of realty in question to defendant. In the following May, through a disagreement, plaintiff and her husband were asked by defendant to leave her home. The following August this suit was commenced without notice to defendant other than the bringing of the suit, which is founded in fraud and undue influence, and further seeks to set aside the transfer on the ground that the relation of parent and child does not permit gifts from child to parent to the material disadvantage of the child. A verbal trust is also sought to be declared in the proceeds of the $5,000 note made out to defendant alone, and by the terms of the property settlement to be paid to defendant. There was a decree for defendant and plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted by *Mr. Wilson T. Hume.*

For respondent there was a brief submitted by *Mr. Plowden Stott* and *Messrs. Malarkey, Seabrook & Dibble.*

OLSON, J.—The relief sought in this suit covers four items. (1) A certificate for 8108 shares of the capital stock of the Big Hill Coal Mining Company. (2) A $5,000 note executed by F. O. Weeks, father of appellant, to respondent as part of the property settlement. (3) Certain parcels of realty in Portland and adjoining thereto, and (4) the rents and profits of a farm near Portland, in which, by the terms of the property settlement, appellant and respondent were given an undivided one-half interest as tenants in common for a period of five years from date of settlement.

1. As to the first item the evidence discloses that such certificate was made out to respondent as trustee. The answer of respondent admits that appellant is the beneficial owner thereof. There having been no dividends, no evidence was presented that the trust by terms has terminated, so nothing further need be said on this point.

2. As to the second item, the exhibits and other evidence show that this note was made to respondent as sole payee; that by the terms of the property settlement it was to be paid to respondent alone, and that the payments were so made by F. O. Weeks, the maker, to respondent, without objection and without inquiring whether appellant was receiving any of the proceeds. The evidence, however, is not convincing as to such prior understanding, and no trust should be declared except on clear and convincing evidence. Counsel for Weeks in the divorce settlement, testifying for appellant, says that F. O. Weeks requested the note to be made out to appellant and respondent jointly; that respondent refused and would not change the note; that she refused to incur the obligation of accounting for the proceeds, and that upon said refusal F. O. Weeks executed the note.

3, 4. As to the third item, counsel have contended for the well-known rule of law that a court of equity will guard the rights of children while standing in the relation of parent and child, and will closely scrutinize gifts from child to parent requiring the parent to prove that the transaction was *bona fide,* free from force, duress or undue influence and not manifest any gross detriment of the child's interest. It seems, however, that this rule does not apply to the case at bar. This was not a gift. At the time of the divorce property settlement, appellant had no rights to this property. She was not entitled to alimony or a property settlement. The property was partially put in her name only after she had promised respondent to deed it back as soon as she became of age. The contracts of a minor are generally not void but voidable, and this agreement was merely voidable. About a year and a half after becoming of age, after appellant had been out in the world and taught school for eight or nine months (the standard experience to cultivate self-reliance and independent action), after appellant was engaged and about to marry, she consummated the agreement made when the original property settlement was made, and conveyed her interest in the realty to respondent. The evidence fails to show fraud, duress or undue influence. The deeds were made at two different times with at least three trips to the notary taking the acknowledgments. Nearly six months later appellant transferred the insurance on a portion of the property. About a month later the farm was partitioned between respondent and F. O. Weeks with appellant's knowledge, and no objection on the part of F. O. Weeks or appellant, nor was appellant required to sign said partition, or agreement, or consent thereto, or execute any further waiver. It

seems conclusive that appellant, while holding title to an interest in said realty, was not a beneficial owner thereof but the mere holder of title to an interest therein, and that the reconveyance of said interest was not a gift as no consideration is required for the conveyance of a bare legal title other than the expressed or implied promise to so convey.

As to the fourth item, the rents and profits of the farm were reserved to appellant and respondent in the deeds given, pursuant to the settlement agreement. They were conveyed to respondent by her deeds November 1, 1915, at which time there were no uncollected rents. Appellant was not a beneficial owner of the realty, and it follows therefore that the decision as to the third item necessarily decides the fourth, and no accounting for such rents and profits should be had.

The trouble between mother and daughter arose over F. O. Weeks. He was active in this suit in the court below and furnished the bond on appeal. The daughter has transferred allegiance to her father. The acts of both father and daughter prior to the trouble between appellant and respondent in May, 1916, are inconsistent with the charges of appellant and testimony of F. O. Weeks. There is no special reason for equity to interfere and reduce the amount of property respondent retained in her divorce property settlement.

The decree of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

BURNETT, J., concurs in the result.

Motion to dismiss appeal submitted October 7, appeal dismissed October 15, rehearing denied November 26, 1918.

EVERDING & FARRELL *v.* GEBHARDT LUMBER CO.

(175 Pac. 611; 176 Pac. 186.)

Appeal and Error—Notice of Appeal—Time for Filing.

1. The service and filing of notice of appeal within the time prescribed by Section 550, L. O. L., as amended by Laws of 1913, Chapter 319, is jurisdictional, and the Supreme Court can neither extend the time nor excuse a failure to file within such time.

ON PETITION FOR REHEARING.

Evidence—Presumptions—Filing of Papers.

2. There is no presumption as to when an attorney files a paper, or that he has filed it within the time prescribed by statute.

Appeal and Error—Notice of Appeal—Time for Serving and Filing.

3. Service and filing of a notice of appeal within sixty days after the rendition of the judgment are acts absolutely necessary to give the Supreme Court jurisdiction.

Appeal and Error—Notice of Appeal—Transcript.

4. A transcript must affirmatively show that a notice of appeal was served and filed within sixty days after the rendition of a judgment.

From Yamhill: GEORGE G. BINGHAM, Judge.

Motion to dismiss appeal sustained and appeal dismissed. Dismissed.

Mr. Frank Holmes and *Messrs. Joseph & Haney,* for the motion.

Mr. J. Brice Polwarth, Mr. J. E. Burdett and *Messrs. Magill & McKenney, contra.*

McBRIDE, C. J.—1. The defendant having prevailed in the Circuit Court, the plaintiff attempted to appeal. Defendant moves to dismiss the appeal for the reason that no notice of appeal was filed with the clerk within sixty days after the date of the judgment, as required by Section 550, L. O. L., as amended by

Chap. 319, Laws of 1913, p. 618, which provides that the notice shall be *served and filed* within sixty days from the entry of judgment. The judgment in this case was entered May 16, 1918, and the notice of appeal was not filed until July 19, 1918, sixty-three days after the entry of judgment.

It appears from the affidavit of Mr. Magill, the counsel who had charge of the matter, that during the interim between the rendition of the judgment and the expiration of the time for filing the notice of appeal, he was a permanent member of the Legal Advisory Board of Division No. 1 of the City of Portland; that in such capacity the greater portion of his time was devoted to the work of that board in the way of assisting and advising registrants, drafted men and volunteers in and about their questionaires, allotments, allowances, insurance, property rights, and various matters, and has prepared for drafted men numerous contracts, wills and affidavits relating to their real and personal property, and has advised them in legal matters to the end that their affairs would be left in good condition and their minds relieved of worry on account thereof, and has constantly and daily been called upon by the local exemption board for advice, and has been in almost daily consultation with said board and the members thereof. The affidavit further states that an immense volume of business was before the board, and that the services of counsel were constantly required both by the board at its headquarters and in affiant's own office, and leaves no doubt in our mind that the services required of the counsel for appellant were constant and of great value, and were rendered without compensation and for motives creditable alike to his good citizenship and patriotism. It is alleged in the affidavit that if there was any failure

to file the notice of appeal within time, such failure is due to the time and mind of counsel being occupied with the patriotic duties above set forth. His statements in this respect are abundantly corroborated by the affidavits of his associates in the patriotic work above described, so we are satisfied that under the pressure of such labors he overlooked filing the notice within the time prescribed by law, and if the statute left us any discretion in the matter we would gladly relieve him and his client of the consequences of the failure. Unfortunately we have no such discretion. The service and filing of the notice of appeal within the prescribed time is jurisdictional and we have neither the power to extend the time, nor the right to excuse a failure to file the notice within the legal period: *State* v. *Zingsen,* 7 Or. 137; *Odell* v. *Gotfrey,* 13 Or. 466 (11 Pac. 190); *Henness* v. *Wells,* 16 Or. 266 (19 Pac. 121); *Taylor* v. *Lapham,* 41 Or. 479 (69 Pac. 439); *Dowell* v. *Bolt,* 45 Or. 89 (75 Pac. 714).

The motion to dismiss must be sustained.

APPEAL DISMISSED.

Denied November 26, 1918.

ON PETITION FOR REHEARING.

(176 Pac. 186.)

Mr. J. Bruce Polwarth, Mr. J. E. Burdett and *Messrs. Magill & McKenney,* for the petition.

Mr. Frank Holmes and *Messrs. Joseph & Haney, contra.*

McBRIDE, C. J.—2. The appellant in its petition for rehearing calls attention to the fact that the copy of the notice of appeal contained in the transcript has

no mark indicating the date when it was filed, and argues in substance, this being the case the court should presume that it was filed within sixty days from the date of the rendition of the judgment appealed from. Upon the former hearing it was set forth in the motion to dismiss that the notice was not filed until after the expiration of sixty days, and this was not denied although voluminous affidavits were filed to excuse the delay, from which the court assumed that the actual date of filing appeared in the transcript. It now appears that there was nothing in the transcript to indicate when the notice was filed, or indeed that it was ever filed, except that in some way the original was in possession of the clerk when the transcript was prepared and sent up.

3–5. There is no presumption as to when an attorney files a paper or that he has filed it within the time prescribed by statute. Service and filing of a notice of appeal within sixty days after the rendition of the judgment are acts absolutely necessary to give the court jurisdiction, and unless the appealing party brings to this court a transcript showing affirmatively that both these acts have been performed, it is the duty of the court when that fact is brought to its notice to dismiss the appeal. The burden is not upon a respondent in such event to produce evidence showing a want of jurisdiction but upon the appellant to make a record showing jurisdiction. The statute requiring a notice of appeal to be served and filed within sixty days is neither harsh nor technical. The time prescribed is ample and a compliance with the requirements of the law easy, but even if it were otherwise this court must abide by the statute which has time and again been held to be mandatory: *Oliver* v. *Harvey,* 5 Or. 360; *State* v. *Zingsem,* 7 Or. 137; *Hemness*

v. *Wells*, 16 Or. 266 (19 Pac. 121); *Taylor* v. *Lapham*, 41 Or. 479 (69 Pac. 439); *Rodman* v. *Manning*, 50 Or. 506 (93 Pac. 366); *Muckle* v. *Columbia County*, 56 Or. 146 (108 Pac. 120).

The petition is denied. REHEARING DENIED.

Argued at Pendleton October 29, reversed and remanded November 26, 1918.

JOHNSON *v.* STILLWELL.

(176 Pac. 123.)

Pleading—Variance—Recovery for Tort on Pleading Contract.

1. Where complaint is based upon a right of action *ex contractu*, plaintiff cannot recover upon proof of a right of action *ex delicto*.

Pleading—Legal Conclusion.

2. In an action for breach of contract to care for livestock, allegation that defendant negligently violated the terms of his agreement was a legal conclusion.

Trial—Instructions.

3. Where plaintiff alleged two causes of action, the first being for balance under contract whereby plaintiff and defendant wintered livestock together, and the second being for breach of contract to care for cattle, instruction that plaintiff was bound by an account stated, provided there had been a settlement, being inapplicable as defense to second cause of action, and being so stated as to apply to both as a defense, was improper.

Account Stated—Unliquidated Damages.

4. A claim for unliquidated damages cannot be the basis of an account stated.

[As to the definition and elements of accounts stated, see note in 62 Am. Dec. 85.]

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This is an action for damages for the breach of a contract. There are two causes of action set out in the complaint. The first recites an agreement be-

tween plaintiff and defendant whereby they were to winter their livestock together during the season of 1917–18, which was done, and that under the terms of the contract, defendant is still indebted to plaintiff in the sum of $254.88.

The second cause of action recites that on May 1, 1917, plaintiff delivered to defendant 186 big cattle and 39 branded calves to be by him safely and securely grazed upon his lands; that defendant was to employ sufficient help to properly salt, care for and keep the cattle upon such grazing lands, and furnish the salt; that he should not permit any sheep to be grazed thereon, or more than 700 head of cattle, exclusive of calves; that defendant should not permit any cattle except the limit of 700 head to graze upon his inclosed pasture lands, and these only at gathering time, to meet deliveries. It is alleged that upon the foregoing terms the plaintiff's cattle were delivered to defendant who was to receive 50 cents per head per month for such pasturage and care. Then follow averments to the effect that about November 1, 1917, plaintiff demanded the return of his cattle and their increase, but defendant has delivered only 174 head of big cattle and only 25 branded calves; that defendant violated the agreement by pasturing 1,700 cattle and two bands of sheep on the lands, and pasturing the inclosed lands with other stock to such an extent as to cause loss of flesh of plaintiff's large animals, and a retarded growth of his calves to his damage in the sum of $1,600. It is then alleged that:

"It was through the negligence and carelessness of said defendant that the said 12 head of big cattle and 14 head of branded calves were lost to plaintiff, and defendant negligently failed and refuses to locate and return the same to plaintiff, to plaintiff's damage in

the sum of $60 per head for said 12 head and $30 per head for said 14 head, a total of $1,140.

"That the damage both in loss of said cattle and branded calves and in the loss of flesh of all the cattle returned resulted from the willful, careless misconduct and improper disregard of the terms and conditions on which said defendant accepted said cattle for grazing purposes on the part of said defendant."

The answer admits that the parties jointly cared for their cattle during the winter of 1916–17, and denies all other allegations of the first cause of action, except as thereafter stated, and then follows the plea of an account stated, whereby it was agreed that there was a balance of $474 due from plaintiff to defendant. As to the second cause of action, after similar denials, defendant again pleads a settlement of accounts and concludes with a prayer for judgment against plaintiff in the sum of $474. A reply, consisting of a general denial was filed, a trial was had to a jury, resulting in a verdict and judgment for defendant in the sum of $319.12, from which plaintiff appeals. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. O. B. Mount* and *Messrs. Crawford & Eakin,* with an oral argument by *Mr. Mount.*

For respondent there was a brief and an oral argument by *Mr. Charles H. Finn.*

BENSON, J.—The first assignment of error is based upon the following recital in the bill of exceptions:

"Townley was called as a witness on behalf of plaintiff and testified that he had 183 head of cattle on this range in 1917 which were mingled with plaintiff's, and being asked if defendant agreed to return his cat-

tle or pay the value thereof if not returned on demand and to state the terms of such agreement as to said guaranty, if any, to which question the defendant objected as incompetent, irrelevant and immaterial, and the objection was sustained by the court and an exception was duly allowed."

This constitutes the entire record upon this point. There is no statement made by the attorney for plaintiff as to what facts he expected to elicit in the answer. In *Kelley* v. *Highfield,* 15 Or. 277, 282 (14 Pac. 744, 746), we find this language:

"The exception taken to the refusal of the court to allow the witness Fred Meyer to answer the question propounded to him is not available. The witness did not answer, and it nowhere appears from the bill of exceptions what fact appellant expected to elicit by the question. To make this exception available the bill of exceptions ought to have gone further and shown what it was expected to prove by the answer to this question."

This ruling has been reiterated many times by this court, the latest being in *Mowrey* v. *Bouton,* 79 Or. 182 (154 Pac. 897).

The court instructed the jury to the effect that unless plaintiff had established by a preponderance of the evidence, that there was a contract, wherein defendant agreed to take plaintiff's cattle to pasture and guaranteed the safe return thereof, there could be no recovery for the loss of stock. The court also refused an instruction requested by plaintiff as follows:

"If you find that defendant did not agree to limit the number of cattle on this range for the year in question, or the kind of stock to be ranged thereon for such season, or did not agree to salt it for the stock thereon, or did not agree to make good any loss, and only accepted the same at the owner's risk, the defendant is still liable to plaintiff and plaintiff is entitled

to recover, if you find that defendant was guilty of negligence."

1. The conflict between the instruction given and the one refused presents the next question for our consideration. It is a settled doctrine that a plaintiff may not base his complaint upon a right of action *ex contractu,* and recover upon proof of a right of action *ex delicto:* Pomeroy's Remedies and Remedial Rights, § 558.

2. The complaint in the present case so far as the second cause of action is concerned, is based exclusively upon alleged breaches of a contract. It is true that plaintiff asserts that defendant negligently violated the terms of his agreement, but the manner of this allegation amounts to no more than a conclusion of law. The pleading is very different from that of *Pilson* v. *Tip-Top Automobile Co.,* 67 Or. 528 (136 Pac. 642), upon which plaintiff seems to rely, since in that case, as the writer of the opinion points out, the gravamen of the complaint is not the breach of the contract in removing the car to another garage, but the negligence of defendant in permitting snow to accumulate upon the roof of the building in which the car was stored. There was no error in the action of the trial court upon this subject. Plaintiff's complaint is so framed that he is not entitled to recover thereon except by proof of a breach of contract.

It is also urged that the court erred in giving to the jury this instruction:

"I instruct you that if you find from the preponderance of the testimony that plaintiff and defendant met on or about the 15th day of February, 1918, or thereabouts, and agreed upon the facts and the relative claims of each against the other and about this stock, and it was fairly understood between them that it was a settlement without condition, then the plaintiff is

bound thereby and your verdict must be for the amount agreed upon between them, and in favor of the party in whose favor said settlement was made."

3, 4. In considering the propriety of this charge, it must be kept in mind that there are two causes of action set out in the complaint: (1) an alleged balance due to plaintiff from defendant upon the joint adventure of wintering their stock, together with an item of $90 for a stopover bill of lading. If this had been the only claim of plaintiff, the instruction might very properly have been given. But the second cause of action is a claim for unliquidated damages for various breaches of an alleged contract, and the instruction is so framed as to apply to both as a defense. In the case of *Vanbebber* v. *Plunkett,* 26 Or. 562 (38 Pac. 707, 27 L. R. A. 811), Mr. Justice WOLVERTON, in an able and exhaustive opinion, discusses the availability of a plea of account stated in such a case and arrives at the conclusion that a promise to pay a certain sum in settlement of a claim for unliquidated damages cannot be the basis of an account stated. This case has been cited with approval in *Pudas* v. *Mattola,* 173 Mich. 189 (138 N. W. 1052, 45 L. R. A. (N. S.) 534). We conclude, therefore, that the court erred in giving this instruction. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HARRIS, J., absent.

Argued at Pendleton October 30, reversed November 26, 1918.

HOSKINS *v.* POWDER LAND & IRR. CO.

(176 Pac. 124.)

Contracts—Modification—Consideration.

1. Promise by a contractor, threatening to abandon his contract, to continue with the contract, was not considered for a promise to pay additional compensation.

Contracts—Extra Work—Conditions.

2. A contractor cannot recover for extra work done under a contract providing that no extra work should be done except upon written directions given by a certain person, unless such written directions were given, or it is shown that such condition was waived.

Contracts—Performance—Decision of Engineer.

3. Where contract provides that the decision of a certain engineer as to the amount of dirt in a grade should be conclusive between the parties, a decision of such engineer can only be impeached for fraud or on other equitable grounds.

Evidence—Opinion—Weight.

4. Testimony of an engineer, who went over the ground before a grade was put in, as to the amount of dirt there was in the grade when completed, must prevail over that of another engineer, who did not go upon the ground until after the completion of the grade.

[As to conclusiveness of decision of architect or engineer under working contract, see note in **Ann. Cas.** 1913A, 180.]

Contracts—Necessity of Performance—Losses.

5. When one agrees to perform an undertaking he must do so, although it entails a loss upon him.

Mechanics' Liens—Sufficiency of Claim and Complaint.

6. A claim of lien for extra material and labor, and complaint, in an action to enforce a lien, must show that the material and labor was furnished for the structure in question.

Mechanics' Liens—Extra Work.

7. Extra work done by a contractor on a dam, consisting of clearing out borrow-pits, and work on a county road a mile from the dam, cannot be made a lien on the dam.

From Baker: GUSTAV ANDERSEN, Judge.

In Banc.

By his second amended complaint the plaintiff seeks to foreclose a lien for labor, services and materials furnished for and used in the construction, alteration and repair of a dam and reservoir for the defendants. It is said that by the original contract the work was

to be completed on or before November 1, 1916. The agreement was made in the name of W. A. Steward, but the complaint avers that it was so made for the benefit of the defendant company and its trustee, J. A. Almirall. After the general averment concerning the execution of the instrument as before indicated, the complaint under consideration contains this allegation:

"That on or about the 5th day of September, 1916, the plaintiff and said W. A. Steward as agent for the defendant Powder Land and Irrigation Company and J. A. Almirall, Trustee, entered into an oral agreement modifying said written agreement, in this: The said Steward as such agent agreed to and with the plaintiff to waive the time limit fixed in said written contract providing for the completion of said contract on or before the first day of November, 1916, as might be necessary for the completion of said dam and reservoir, provided that the plaintiff would complete and finish said dam and reservoir as soon as possible, and without unnecessary delay, and that said W. A. Steward as such agent further agreed to and with plaintiff on or about the 5th day of September, 1916, that after said date, he would furnish at his own expense all powder, caps and fuse and pay for all labor from and after said last-named date necessary for clearing and grubbing of the borrow-pits until said reservoir and dam was fully finished and completed, plus ten per cent for all such labor, and the plaintiff thereupon agreed to and with said Steward, agent for defendant Powder Land and Irrigation Company, and J. A. Almirall, Trustee, to proceed with the construction of said reservoir and dam and to finish and complete the same as soon as possible, and without unnecessary delay.

"That said written contract aforesaid was further modified in this: That from time to time during the progress of work and construction on said reservoir and dam, between the first day of July, 1916, and the 9th day of November, 1916, the plaintiff at the special instance and request of the said W. A. Steward, agent

as aforesaid, performed extra work and furnished extra material in the construction, alteration and repair of said dam and reservoir not contemplated by or included within the terms and conditions of said written contract and that the defendants undertook, promised and agreed to pay the plaintiff therefor."

The plaintiff avers as a conclusion that the lump sum of $15,493.01 was the contract and reasonable price for the work performed and the material furnished under the written stipulation and the alleged modifications thereof, and that no part thereof has been paid to the plaintiff except $12,300.35, leaving a balance of $3,192.66, for which with $500 as attorneys' fees, $5 for preparing the lien and the further sum of $2 for recording the same, the plaintiff prays decree and foreclosure of the lien.

A general demurrer to the complaint under consideration was overruled by the court, whereupon the defendants answered, denying the whole complaint, except the corporate existence of the company and except as stated in the new matter of the answer. In substance, the first affirmative defense is that the contract was made between the plaintiff and W. A. Steward personally and not as the agent of the defendant company or anyone; that the agreement was that the work should be completed on or before November 1, 1916, time being made the essence of the contract, and that about October 9th of that year the plaintiff abandoned the work, notifying Steward in writing to that effect, whereupon the latter called in the surety of the plaintiff, which took up the work and completed it on October 31, 1916, while the notice of lien was not recorded until more than sixty days thereafter, viz., January 8, 1917.

The second defense is in substance a rehearsal of the terms of the contract, hereinafter more fully

noticed, which the defendants claim estop the plaintiff from alleging the matter already quoted from the amended complaint. For a third ground of opposition to the complaint the defendants plead that the plaintiff is estopped from enforcing a lien, because he abandoned the contract, by reason of which he should not be permitted to maintain any action or suit thereon. Lastly, the defendants plead that on December 9, 1916, the plaintiff agreed with Steward, in whose name the contract was made, that if the latter would pay a debt owing by the plaintiff to the Basche-Sage Hardware Company, amounting to $1,196.16, the plaintiff would accept the same as full and final settlement of all sums and accounts due him for labor performed and material furnished upon the dam in question, either by the terms of the written contract or otherwise, which offer was accepted by Steward, who paid to the Hardware Company the amount mentioned, as a full settlement and satisfaction of the plaintiff's demand on account of the transaction about the dam.

The new matter in the answer was denied by the reply. The trial before the Circuit Court resulted in a decree for the plaintiff, from which the defendants appeal. REVERSED.

For appellants there was a brief by *Messrs. Clifford & Correll,* with an oral argument by *Mr. Morton D. Clifford.*

For respondent there was a brief with oral arguments by *Mr. John L. Rand* and *Mr. William Packwood, Jr.*

BURNETT, J.—At the hearing before the Circuit Court it was agreed that the following items of the plaintiff's claim were the only ones disputed:

Concrete piers, 4.86 cubic yards, at $15.60 per yard	$75.25
Excavation and placing earth in the embankment for reservoir dam, 32,691 cubic yards, at 35¢ per yard	11,441.85
Work and labor for August, 1916, in addition to above	123.44

The defendants admit $121.95 of this last item, challenging thereof only $1.49, but dispute the following:

For work, labor and material furnished for September, 1916, in addition to the above.	$899.81
Work and labor for October, 1916, in addition to the above	460.32
Work and labor and material furnished for November, 1916, in addition to the above	416.75

1, 2. We note that the complaint attempts to plead modification of the contract in three respects: 1. The waiver of the time in which the work should be completed. 2. That on or about September 5, 1916, the agent of the defendants in whose name the contract was made was to furnish powder, caps and fuse and pay for clearing and grubbing the borrow-pits, plus 10 per cent of the cost. 3. That during the progress of the undertaking at the special instance and request of W. A. Steward, the agent of the defendants, the plaintiff performed extra work and furnished extra material in the construction of the dam and reservoir not included in the terms of the written contract, for which the defendants agreed to pay the plaintiff. Taking these in inverse order, we discern from the contract, which was admitted in evidence without objection, that:

"No extra work shall be done without written orders from W. A. Steward or his engineer. Extra work or material of a character not provided for in the specifications if ordered in writing by the engineer,

will be paid for at actual necessary cost, as determined by the engineer, plus 10 per cent for profit, superintendence, and general expenses. The cost of extra work shall include all materials, labor and fuel furnished by the contractor; but shall not include use of tools or machinery, office expenses, general superintendence, or other general expenses. Demand for payment must be made in writing by the contractor promptly upon the completion of the extra work or furnishing of the extra material.' The account including the same must be accompanied by the certificate of the engineer stating that such work has been satisfactorily performed or such material furnished, and stating the amount to be allowed therefor. The contractor shall, when requested by the engineer, furnish itemized statements of the cost of the work ordered, and give the engineer access to accounts, bills, and vouchers relating thereto."

If the work mentioned in the third modification, as pleaded, related to the erection of the dam in any way, it was already provided for in the excerpt just quoted from the written contract, so that the allegation does not amount to a modification. As to the expense for powder, caps and the clearing and grubbing of the borrow-pits, the consideration for the alleged agreement of Steward to pay for the same as averred in the complaint is that:

"The plaintiff thereupon agreed to and with said Steward, agent for defendant * * to proceed with the construction of the said reservoir and dam and to finish and complete the same as soon as possible, and without unnecessary delay."

Recalling that at that very time the plaintiff was under contract to finish the identical dam, we read from 13 C. J. 351:

"A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to

which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise to perform, an existing legal obligation is not a valid consideration. This legal obligation may arise from the law independent of contract, or it may arise from a subsisting contract."

After discussion of the obligation at law, the author, speaking of subsisting contractual obligations, continues on page 353:

"The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration."

See, also, *Nine* v. *Starr,* 8 Or. 49; *Myers* v. *Livesley,* 56 Or. 383, 389 (107 Pac. 476, 108 Pac. 121); *Hillman* v. *Young,* 64 Or. 73 (127 Pac. 793, 129 Pac. 124); *Muir* v. *Morris,* 80 Or. 378 (154 Pac. 117, 157 Pac. 785).

The testimony of the plaintiff in this connection is in substance that after he had entered upon the performance of the undertaking he saw that he would be unable to complete the contract except at a loss, and therefore went to Steward and offered him $1,000 if the latter would release the plaintiff from the work, but that Steward declined the offer, whereupon it was agreed that Steward should pay the plaintiff for clearing the borrow-pits and the like, as stated, in consideration of which the plaintiff agreed to complete the dam. The reason he avowed for thus approaching Steward was that he was compelled to haul earth to make the fill of the dam farther than he had

originally supposed. In that respect the admitted contract contains this provision:

"The party of the first part hereby agrees that he has, in person, or by his agent, examined the premises and line of dam on which the work is to be performed, and his knowledge of the conditions surrounding the same is gained from such observations and not from representations of the engineer or the party of the second part."

In the specifications attached to and made a part of the contract and introduced into evidence by the plaintiff appears the following:

"Borrow-pits and classification of material:—The engineer will designate the borrow-pits from which all materials for the fills shall be obtained. The contractor shall strip the borrow-pits to the satisfaction of the engineer and the cost of such stripping shall be included in the price bid for the fill. The classification of the materials from the borrow-pits shall be under the supervision of the engineer who will, at all times, direct at what points it shall be placed on the dam. The price per cubic yard, bid by the contractor, for fill shall include all plowing or loosening in the borrow-pits, loading, hauling, unloading, spreading, wetting and rolling, and no allowance whatever will be made for overhaul. The average length of haul will be approximately one thousand (1,000) feet from the borrow-pits to the dam. All payments for materials placed in the fill shall be on the basis of actual volume measured in the dam after settlement of the fill has ceased."

There is no pretense of stating in the complaint that the plaintiff was induced to execute the contract by reason of any fraud or deceit upon the part of the defendants or their agent. It is plain, therefore, from the authorities and from the evidence of the plaintiff himself that the supplementary agreement as stated in the complaint concerning the clearing and grubbing

of the borrow-pits was without consideration and hence void. It is a case of a contractor's refusing to perform his undertaking except upon condition that he receive extra remuneration above what he agreed upon. As to the items now under consideration, the plaintiff is confronted with a dilemma. If the work of clearing the borrow-pits was part of the original undertaking, the plaintiff has no right to make an extra charge for it. On the other hand, if it was not connected with the contract, it does not constitute a lienable item. Moreover, it is not pretended that any written directions were given to perform this extra work, if extra at all, nor was there any attempt to comply with the quoted excerpt from the contract in that respect. Neither is it pleaded that the performance of this stipulation was waived. *Apropos* of this phase of the case, we quote from *Vanderhoof* v. *Shell*, 42 Or. 578, 585 (72 Pac. 126):

"It is competent for parties to stipulate in a contract of the nature of the one here in controversy that the contractor shall procure the certificate of an architect that the work has been performed or the building completed in accordance with his undertaking, as a condition precedent to the payment of any installment or the amount finally to become due. Generally speaking, no action or suit can be maintained therefor against the owner until the condition is performed or its requirements waived. The contract becomes a law between the parties in this respect, as they expressly agree that the amount due for the service shall be established by the certificate of the architect; and it throws upon the contractor the burden of producing the particular kind of evidence required by the mutual stipulations of the parties concerning it, unless the circumstances are such * * that the contractor is unable to produce it through no fault of his. Were it otherwise the law would take from the owner the particular kind of protection against defective and lax performance that he has ex-

pressly stipulated for: *Hanley* v. *Walker*, 79 Mich. 607 (45 N. W. 57, 8 L. R. A. 207); *Clarke* v. *Watson*, 18 Com. B. (N. S.) 278; *United States* v. *Robeson*, 34 U. S. (9 Pet.) 319 (9 L. Ed. 142); *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549 (29 L. Ed. 255, 5 Sup. Ct. Rep. 1035); *Hudson* v. *McCartney*, 33 Wis. 331; *Smith* v. *Brady*, 17 N. Y. 173 (72 Am. Dec. 442); *Michaelis* v. *Wolf*, 136 Ill. 68 (26 N. E. 384). A salutary rule of practice also requires that where there is an excuse, or sufficient reason exists why the contractor has been unable to secure or produce such a certificate—as that it has been waived, or the like—it should be averred in the pleadings, so as to lay a foundation for the admission of the proofs to establish the condition."

See, also, *Hart* v. *Carsley Mfg. Co.*, 221 Ill. 444 (77 N. E. 897, 112 Am. St. Rep. 189, 5 Ann. Cas. 720), and *Korbly* v. *Loomis*, 172 Ind. 352 (88 N. E. 698, 139 Am. St. Rep. 379, 19 Ann. Cas. 905).

This disposes, adversely to the plaintiff, of the following disputed items in his claim of lien:

Deduction from work for July and August	$ 1.49
Work for September	899.81
Work for October	460.32
Work for November	416.75
	$1,778.37

3. It remains to consider the dispute between the parties as to the item for filling the embankment. The plaintiff testified that the engineer in charge of the work computed the amount of the fill as 27,441 cubic yards, while the claim is for 32,691 cubic yards. We read in the contract as follows:

"To prevent all disputes and misunderstandings in relation to any of the stipulations contained in this agreement or performance by either of said parties, the said engineer shall be and hereby is made umpire to decide all controversies arising or growing out of this contract and his decision on any point or matter touch-

ing this agreement shall be final and conclusive between the parties hereto. And it is further agreed between said parties that wherever the word 'engineer' is used it shall be taken and construed to mean chief engineer employed by said second party."

Further, in the specifications, we find:

"Where the word 'engineer' is used in the general conditions or detail specifications, or in the contract, it shall be and is mutually understood to refer to the engineer employed by W. A. Steward to supervise the construction of all or any part of the work contemplated in these specifications. The engineer will give the locations and the grades for the work, and no work depending on such locations and grades will be commenced until these have been established, and the contractor shall provide such materials and give such assistance as may be required by the engineer. Upon all questions concerning the execution of the work, the classification of the material in accordance with the specifications, and the determination of costs, the decision of said engineer shall be binding on both parties."

As said by Mr. Justice EAKIN in *Williams* v. *Mt. Hood Ry. & P. Co.*, 57 Or. 251, 257 (110 Pac. 490, 492, Ann. Cas. 1913A, 177):

"Parties to a contract may stipulate that the estimate of the work done, and the amount due under the contract shall be made by a third party, and shall be final and conclusive. There are a multitude of cases so holding."

In a copious note to *Mercantile Trust Co.* v. *Hensey*, 205 U. S. 298 (27 Sup. Ct. Rep. 535, 51 L. Ed. 811, 10 Ann. Cas. 572), a wealth of precedent is collated on this point. Of course the decision of the engineer could be impeached for fraud or on other equitable grounds, but there is no question of that kind embodied in the pleadings in the instant case.

4. It is true that the plaintiff produces the testimony of an engineer who undertook to measure the amount of

the fill in the dam after the same had been constructed. The witness, however, admitted that it was impossible to make an accurate measurement under such circumstances, the reason being that in filling any irregular space where there are projections or depressions of unknown dimensions, no accurate measurement can be accomplished after they are covered up by the fill. The engineer of the defendants who had charge of the work had made his measurements and cross-sections before any fill was begun, and he consequently had reliable data from which to compute the yardage in the dam. Moreover, as provided by the contract, his adjustment of the matter was made conclusive by the stipulation of the parties. Both on account of the agreement on that subject and of his better opportunity to know the accuracy of his computation, the testimony of the defendants' engineer in charge of the work must be held to prevail over that of the plaintiff's witness, who went upon the ground after the completion of the embankment. The difference between the two amounts is 5,250 cubic yards, which at the contract price of 35 cents per cubic yard amounts to $1,837.50, which must be deducted from the plaintiff's claim. This makes a total deduction, counting the previous items mentioned, of $3,615.87, which amounts to more than the balance of $3,192.66 claimed by the plaintiff. This renders it unnecessary to consider the disputed item concerning the concrete piers, further than to say that the engineer's measurement makes that item considerably less than the amount claimed by the plaintiff.

5, 6. In consideration of the testimony it gives one pause on finding the plaintiff offering $1,000 to be released from the contract and afterwards appearing in court claiming a balance due for extra work in the sum of upwards of $3,000. The law is that when one agrees to perform an undertaking, he must do so, although it

entails a loss upon him, and it will not be permitted that he disregard the protection thrown about the other parties respecting new or extra work and pad his claim until he can wipe out his anticipated loss. The claim of lien and the complaint upon which it is based is insufficient in respect to the disputed items for extra labor in that it does not show that it was for work performed upon the structure in question, under the contract or the modifications thereof.

7. Again, the testimony of the plaintiff was that the greater part was for clearing the borrow-pits, which we have shown was not properly charged against the defendants, and some of it was for work on a county road, part of which was a mile or more from the dam. The statute giving a lien contemplates that the labor and materials must be used in the erection upon which the lien is claimed. The items last mentioned do not, in our judgment, come within that category even on the merits of this case, which is for the foreclosure of such a lien. Whatever claims the plaintiff may have against the defendants cannot be worked out in this proceeding, unless it is shown that they are for lienable items.

The complaint did state sufficient to support part of the claim and hence the general demurrer was properly overruled, but the principle was not waived when it came to the proof of the plaintiff's allegations. It is unnecessary to discuss the other questions raised by the answer. The result is that the decree of the Circuit Court is reversed and the suit is dismissed.

REVERSED AND SUIT DISMISSED.

HARRIS, J., absent.

Argued October 15, reversed and remanded November 26, 1918.

BENEKE *v.* TUCKER.

(176 Pac. 183.)

Pleading—Equitable Suits—Demurrer.

1. Section 68, L. O. L., enumerating grounds of demurrer to a complaint, and Section 71, providing that such objections may be taken by answer, when not appearing on the face of the complaint, are applicable to suits in equity, in view of the express provisions of Section 395.

Abatement and Revival—Demurrer—Other Actions Pending—Pleading.

2. Sections 68, 71, L. O. L., relating to grounds of demurrer to a complaint, do not change the nature of the plea of "another action pending"; the plea still being in abatement of the action against which it is interposed.

Abatement and Revival—Grounds—Other Actions Pending—Suits in Same State.

3. The rule that a subsequent action will be abated by the pendency of a prior action between the same parties on the same cause of action is generally confined to those cases where both actions are pending in courts of the same state.

[As to abatement of one action by the pendency of another in the same state, see note in 84 **Am. Dec.** 452.]

Abatement and Revival—Continuance—Other Actions Pending—Suits in Foreign State.

4. While the pendency of a prior action in another state does not entitle a party as a matter of right to an abatement of the second action, the court may in its discretion postpone the second action until after decision of the first.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

This is a suit to recover on a note for $1,750 and to foreclose a mortgage given as security for the debt. John Beneke and George F. Hauser, the plaintiffs, owned two lots in Portland, Oregon, and G. G. Tucker, the defendant, owned a ten-acre orange grove in Los Angeles County, California. The two lots in Portland were free from liens and charges except a street assessment amounting to about $350. The California tract

was encumbered with two mortgages, one for $4,000 and the other for $3,600.

On March 13, 1913, Beneke and Hauser entered into a written contract with Tucker for the exchange of their respective properties. The contract fixed the gross price of the California tract at $13,000; and therefore the "equity" owned by Tucker amounted to $5,400. The writing states that $7,500 is the gross price of the Portland lots, but that the net price, after deducting the $350 street assessment, amounts to $7,150. The contract required Tucker to deed the California property to Beneke and Hauser, and they, Beneke and Hauser, agreed to assume and pay the two mortgages encumbering the property. Beneke and Hauser agreed to deed the Portland lots to Tucker and the latter stipulated that he would assume and pay the street assessment. The contract also contained a provision obligating Tucker to give his note to Beneke and Hauser for $1,750, the difference between $7,150, the net price of the Oregon lots, and $5,400, the "equity" remaining in the California tract, and to secure the note with a mortgage on one of the lots. The written contract was carried out and Tucker took possession of the Portland property and Beneke and Hauser entered into the possession of the California tract. The note is dated March 27, 1913, and is payable two years after date to the order of Beneke and Hauser with interest. The interest was regularly paid until the note matured on March 27, 1915, but no further payments were made after that date on the interest and no part of the principal was ever paid, and on September 11, 1916, the plaintiffs commenced this suit.

The complaint is in the usual form and prays for a judgment for the amount due on the note together with $250, alleged to be a reasonable attorney's fee, and

costs and disbursements and for a decree foreclosing the mortgage.

The answer, which was filed on October 18, 1916, admits the execution of the note and mortgage, denies that plaintiffs are entitled to the sum of $250 or any other sum as a reasonable attorney's fee and contains three further and separate defenses. The first defense is at the most only an epitome of the second separate defense and for that reason may be laid out of the case. The second defense in substance charges that the plaintiffs fraudulently represented to the defendant, who lived in California and had no knowledge of the Oregon property, that the Portland lots were worth $7,500, when in truth their value did not exceed $2,900, and that each lot had a frontage of 100 feet when in truth the frontage of each lot did not exceed 50 feet; and the defendant therefore alleges that the note and mortgage were entirely without consideration.

For a third defense "and as a plea in bar to this action, defendant alleges:

That there is now pending on appeal in the Supreme Court of the State of California, an action for damages against the above-named plaintiffs, in the sum of $4,600.00, on the facts heretofore alleged."

The answer concludes with a prayer that this suit be stayed until the determination of the action pending in the Supreme Court of California, or if a stay is denied that the mortgage be adjudged fraudulent and void and that it be canceled.

The plaintiffs demurred "to the answer and cross-complaint of the defendant on file herein for the reason that it appears upon the face of said answer and cross-complaint that there is another action pending between the same parties for the same cause and upon the same facts as set forth in defendant's answer and cross-complaint."

The trial court sustained the demurrer. The defendant refused to plead further and subsequently on March 20, 1917, the court entered a decree which, after reciting the refusal of the defendant to plead further after the demurrer had been sustained, awards a judgment against the defendant for $1,750 with interest together with costs and disbursements and provides for the foreclosure of the mortgage. The defendant appealed. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. George S. Shepherd, Mr. H. A. Barclay,* and *Willametta McElroy,* with an oral argument by *Mr. Shepherd.*

For respondents, there was a brief over the names of *Mr. George R. Alexander* and *Messrs. Benson & Benson,* with an oral argument by *Mr. Alexander.*

HARRIS, J.—1, 2. The demurrer was directed against the answer as a whole and the ruling of the court was evidently predicated upon the theory that the action pending on appeal in the Supreme Court of California barred the second defense relied upon by the defendant. The Code specifically provides that "another action pending" is a ground for demurrer when a complaint discloses that another action is pending between the same parties for the same cause; and when not appearing upon the face of the complaint the objection may be taken by answer: Sections 68 and 71, L. O. L. These two sections of the Code are also applicable to suits in equity: Section 395, L. O. L.; *Crane* v. *Larsen,* 15 Or. 345 (15 Pac. 326). These statutory provisions do not, however, change the nature of the plea of "another action pending"; for, now as before, the

plea is in abatement of the action against which it is interposed: Hopgood v. Patterson, 2 Or. 50; 1 C. J. 48.

We shall assume for the purposes of the instant case that on the facts presented by the record before us the plea of "another action pending" will operate to produce whatever result would follow from the fact that an action *in personam* is pending in another state. In other words, we do not attempt to decide whether the plea of another action pending is affected by the circumstance that such other action is pending on appeal, (1 C. J. 98; *Hutchings* v. *Royal Bakery*, 66 Or. 301, 303 (131 Pac. 514, 132 Pac. 960, 134 Pac. 1033); or by the fact that the defendant in one action is a plaintiff in the other proceeding (1 C. J. 79, 82; *Crane* v. *Larsen*, 15 Or. 345, 349 (15 Pac. 326); or by the fact that the first proceeding is an action for a money judgment against the defendant while the second proceeding is a suit to foreclose a mortgage (1 C. J. 51, 82); nor do we decide whether the allegations found in the answer do or do not sufficiently plead "another action pending" (31 Cyc. 180; *Crane* v. *Larsen*, 15 Or. 345, 350 (15 Pac. 326); but we shall merely assume that it sufficiently appears from the answer that there is another action pending in the State of California between the same parties and for the same cause and that the litigants here are entitled to the uttermost benefits, whatever they may be, that flow from the fact that an action *in personam* is pending in another state.

3. The rule that a subsequent action will be abated by the pendency of a prior action between the same parties for the same cause is generally confined to those cases where both actions are pending in courts of the same state. In the application of the doctrine of "another action pending" each state is regarded as foreign to every other state, and hence the pendency of

an action *in personam* in one state cannot, as a rule, be made to abate an action subsequently commenced in another state between the same parties for the same cause, even though complete jurisdiction has been acquired by the court where the first action is pending (*McNamara* v. *McAllister,* 150 Iowa, 243 (130 N. W. 26, Ann. Cas. 1912D, 463, 34 L. R. A. (N. S.) 436); *Douglass* v. *Phenix Ins. Co.,* 138 N. Y. 209 (33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118); *Sloan* v. *McDowell,* 75 N. C. 29; *Hill* v. *Hill,* 51 S. C. 134 (28 S. E. 309); 1 C. J. 84); and this rule is not affected by Codes which contain provisions like Sections 68 and 71, L. O. L., but such Code provisions are construed to apply only to suits and actions pending in the same state: *Hill* v. *Hill,* 51 S. C. 134 (28 S. E. 309); *Sloan* v. *McDowell,* 75 N. C. 29; *Schmidt* v. *Posner,* 130 Iowa, 347 (106 N. W. 760).

4. While the pendency of a prior action in another state does not entitle a party as a matter of right to an abatement of the second action, the court may in its discretion postpone the second action until after a decision of the first action: *Schmidt* v. *Posner,* 130 Iowa, 347 (106 N. W. 760); *Douglass* v. *Phenix Ins. Co.,* 138 N. Y. 209 (33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118); *Hill* v. *Hill,* 51 S. C. 134 (28 S. E. 309); 1 C. J. 85; 1 R. C. L. 16. Regardless of whether or not an abatement completely terminates a proceeding or merely suspends it (1 C. J. 26, 27), the situation presented by the instant case is one where the defendant on the one hand could not insist as a matter of right that the demand of the plaintiffs for a money judgment and a decree of foreclosure be abated, and the plaintiffs on the other hand could not say that they were entitled as a matter of right to an abatement of the prayer of the defendant for a cancellation of the note

and mortgage on account of a total want of consideration; but a continuance of the suit was the most that either the plaintiffs or the defendant could ask for; and the most that the court could do was merely to exercise its discretion and allow or refuse a continuance.

The second further and separate defense pleaded by the defendant is not, as claimed by the plaintiffs, predicated upon a rescission of the contract; but this defense proceeds upon the theory that the defendant has affirmed the exchange and is seeking reimbursement by bringing about a cancellation of the note and mortgage on account of an alleged complete want of consideration, the defendant claiming that instead of the orange grove being worth $1,750 less than the Oregon property the California tract was in truth worth $2,500 more than the Portland lots.

The judgment and decree appealed from are reversed and the cause is remanded for such further proceedings as may not be inconsistent with this opinion.

REVERSED AND REMANDED.

McBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

Submitted on briefs at Pendleton October 29, affirmed November 26, 1918.

JONES LAND & LIVESTOCK CO. *v.* SEAWELL.

(176 Pac. 186.)

Animals—Trespassing—Actions for Damages—Necessity of Fence.

1. A land owner is not obliged to fence his lands before he can maintain an action of damages for trespass by cattle thereon.

Evidence—Declaration—Ownership of Sheep.

2. In view of Section 799, Subsection 11, L. O. L., stating the presumption that things in the possession of a person are owned by

him, declarations of a sheep herder in possession of sheep that defendant was the true owner are admissible in an action for trespass by the sheep.

Appeal and Error—Preservation of Objections—Necessity of Objections—Evidence.

3. In the absence of an objection before the answer of a witness as to ownership of sheep which trespassed on plaintiff's land, the admissibility of such testimony cannot be considered on appeal.

Appeal and Error—Preservation of Objections—Motion to Strike Evidence.

4. In the absence of a motion to strike answer of witness, admissibility of the evidence cannot be considered on appeal; there having been no objection to question.

Animals—Variance—Time of Trespass.

5. A complaint alleging trespass by sheep on a specific day, and proof disclosing a trespass extending into the following day, *held* to present no material variance in view of Section 97, L. O. L., declaring that no variance is material unless it actually misleads the adverse party to his prejudice.

Animals—Trespass—Ownership.

6. In action for trespass by sheep, evidence *held* to show that defendant was the owner thereof.

[As to the liability of the owners of trespassing animals, see note in 28 Am. Rep. 569.]

Costs—Costs on Trial After a Mistrial.

7. Where the first trial resulted in a failure of agreement by the jury, plaintiff, who was successful at the second trial, *held* entitled to all his costs and necessary disbursements in both trials.

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is an action to recover damages for the trespass of sheep upon the unfenced lands of the plaintiff. The complaint, after reciting the ownership and possession of certain described lands in the plaintiff, continues as follows:

"That on said —— day of June, 1917, and while plaintiff was so the owner and possessor of the said premises, the defendant wrongfully broke into and entered upon said premises and drove a large band of sheep in and upon said land, causing his sheep to pasture the said land and to eat and destroy the grass thereon; that the said defendant did also tear down

and destroy certain corrals, poles, trees and fencing in and upon said premises, to the plaintiff's damage in the sum of $300."

The answer consists of a general denial. A trial was had to a jury, resulting in a verdict and judgment for plaintiff and defendant appeals. AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. McCulloch & Wood.*

For respondent there was a brief prepared and presented by *Mr. William H. Brooke* and *Mr. P. J. Gallagher.*

BENSON, J.—Defendant urges very earnestly:

"That modern legislation in this state, together with the changed conditions in eastern Oregon, and the customs of the stockmen residing there, has abrogated the common-law rule in regard to animals running at large in the state."

In support of this contention our consideration is directed to the cases of *Campbell* v. *Bridwell,* 5 Or. 311, and *Walker* v. *Bloomingcamp,* 34 Or. 391 (43 Pac. 175, 56 Pac. 809). As regards the first of these cases, it may be observed that the decision is based upon the statute then existing in relation to trespass by stock, and in the second, the opening paragraph of the opinion, which was written by Mr. Chief Justice BEAN, says:

"The common-law rule, by which the owner of domestic stock was made liable for the injury done by them to the uninclosed lands of another is not in force in the portions of this state to which the fence law is applicable: *Campbell* v. *Bridwell,* 5 Or. 311."

1. In *French* v. *Cresswell,* 13 Or. 418 (11 Pac. 62), it is distinctly held that in the absence of a statute chang-

ing the common-law rule, a party is not obliged to fence his lands before he can maintain an action of damages for trespass by cattle thereon. This doctrine has been consistently adhered to ever since by this court, and must now be considered a closed question until, by legislative action, some change is made.

It is next maintained that plaintiff is not entitled to recover for the damage done to the grass upon its lands, because the punctuation of the complaint appears to make it claim compensation for nothing more than the destruction of corrals, trees, poles and fencing, but we think that in this contention the learned counsel is hypercritical. We think that no reasonable person could be misled by the erroneous punctuation into thinking that the plaintiff was not seeking compensation for the loss of the grass.

2. Defendant further complains that the court erred in permitting the witness Roller to testify that one Elliott told him, at the time the sheep were driven upon plaintiff's land, that he was working for Seawell and that the sheep belonged to Seawell. In considering this assignment it is necessary to consider some other evidence. The witness Roller was a herder of a band of 2,500 sheep belonging to one Bowman. On the day of the alleged trespass, these sheep became mingled with a band of about 4,000 sheep in charge of Elliott, and since it was necessary to use corrals in the process of separating the entangled flocks, they drove them upon plaintiff's land where such corrals were available. Here they remodeled the inclosures in such fashion as to better serve their needs, incidentally cutting down some trees for use in additional structures. They drove the sheep upon plaintiff's land in the morning of one day and did not remove the animals from the premises until about noon the next day. The de-

fendant himself testified that Elliott was working for him during the month of June and had charge of sheep in that vicinity. Subsection 11 of Section 799, L. O. L., declares the presumption "that things in the possession of a person are owned by him." As a logical sequence of this presumption it has been held that the declarations of a person in possession of property, in regard to the true ownership are competent evidence. In the case of *Bradley* v. *Spofford,* 23 N. H. 444 (55 Am. Dec. 205), the court says:

"The declaration of Robinson's wife, made while she was at work on the stock, that it belonged to the plaintiffs, was competent evidence to show their title. Her possession unexplained would have been evidence of title in herself. In the absence of proof to the contrary, she would be presumed to hold and claim for herself. But her declaration, accompanying the act of possession, shows that she holds not for herself, but for the plaintiffs. Such declarations of the persons in possession are not only competent evidence to rebut a title set up by or under the party who made them, but are affirmative evidence of title in the party for whom the person in possession declares that he holds it," citing a number of cases in support of the doctrine.

3, 4. As regards a similar objection to like evidence given by the witness Becker, it is sufficient to say that no objection was made to the question until after it was answered, and no motion was made to strike out the answer, and therefore it cannot be considered: *Perry* v. *Hunt,* 62 Or. 256 (125 Pac. 295).

5. It is then urged that there is a fatal variance between the pleading and the proof, in that the complaint alleges a single trespass, occurring upon a specific day, while the proof discloses a trespass extending into the following day. This contention is sufficiently answered by the language of the opinion in the case of *Burnham* v. *Call,* 2 Utah, 433, as follows:

"It is assigned for error that the court below, over the objection of appellants, admitted evidence of the cutting of the grass, and taking and carrying away hay on the 5th day of July, 1876, when the trespass was alleged to have taken place on the 4th of July, 1876, and was not laid for any other day.

"The former doctrine was that such proof could not be admitted when the complaint contained no *continuando* nor any allegation of the trespass on 'divers other days.' This doctrine, however, is not consistent with the liberal rule required under our practice. The courts must see that substantial justice is done, and technical objections, not affecting the substantial rights of the parties, must be disregarded."

This quotation is in harmony with the provisions of Section 97, L. O. L., which declares that no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. There is nothing in the record before us to indicate that the defendant was so misled.

6. It is also urged that the court erred in denying defendant's motion for a nonsuit, based upon the ground that there was no competent evidence of the ownership of the sheep. In addition to the testimony of the witness Roller, already discussed, there was the testimony of the witness Billingsly that in the month of May he had sold a band of sheep to defendant which bore the same brand as that found upon the trespassing animals, and there was also the testimony of a witness that in the succeeding month, July, he saw the same employees, including Elliott, handling a band of sheep, bearing the same brand, in the railroad yards at Juntura, and that the defendant was there weighing such sheep. There was ample evidence upon the question

of ownership to go to the jury and the motion was properly denied.

There are some other minor assignments of error in the abstract, but except as they have already been discussed herein, they are not urged in defendant's brief and we assume that they were abandoned.

7. Defendant also appeals from the order of the trial court in regard to the taxation of costs. It appears from the record upon this subject that there were two trials of this case in the lower court, the first of which resulted in a mistrial by reason of the jury's failure to agree. After judgment was entered herein, plaintiff filed his cost bill, wherein the disbursements of the first trial are separately stated, and followed by an itemized statement of the costs and disbursements of the second trial. Defendant filed his objections to the cost bill in accordance with the provisions of Section 569, L. O. L., and thereafter a hearing thereon was had as provided in Section 570, L. O. L. There is nothing in the bill of exceptions, and we have no evidence before us on the question of fact involved. However, the principal contention of defendant is a question of law, appearing upon the face of the record, and that we shall consider. It is contended that plaintiff is not entitled to recover his disbursements in more than one trial, and that the court erred in allowing the expenditures of that trial in which there was no verdict. Both of the litigants call our attention to the same authorities in support of their several contentions: *Wade* v. *Amalgamated Sugar Co.*, 71 Or. 75 (142 Pac. 350), and *City of Seaside* v. *Oregon Security and Casualty Co.*, 87 Or. 624 (171 Pac. 396). In the former of these cases, the plaintiff, in the first trial secured a judgment which was subsequently reversed, and thereafter obtained a valid judgment. This court held that plaintiff was not

entitled to recover his costs upon the erroneous judgment. In the later case the situation is reversed, for there the defendant obtained an erroneous judgment upon the first trial which was reversed, and upon a second trial the plaintiff prevailed, and since the errors of the first trial were not imputable to the plaintiff, he was allowed his costs and disbursements in both. In the case at bar, the first hearing did not result in a judgment for either party, and the failure of the jury to agree upon a verdict cannot be charged to either party. In this case the plaintiff was obliged to call his witnesses into court a second time, and without his fault was called upon to make necessary disbursements until the controversy resulted in a judgment. For these, under the law, he is entitled to a judgment, and we find no error in the action of the trial court.

The judgment is therefore in all things affirmed.

AFFIRMED.

Argued October 8, affirmed November 12, rehearing denied December 3, 1918.

STATE v. SHUSTER.

(175 Pac. 862.)

Criminal Law—Verdicts—Degree of Offense.

1. Generally a verdict of guilty need not specify the degree of crime of which defendant is convicted; a verdict of guilty as charged in the indictment finding the defendant guilty of highest degree therein charged.

Embezzlement—Verdict—Amount of Money.

2. Verdict finding defendant "guilty as charged in the indictment," which specified amount of money embezzled, was sufficient compliance with Section 1958, L. O. L., providing that verdict finding a public official guilty of larceny must ascertain as near as may be the amount of money taken.

[As to what is embezzlement and who may be charged therewith, see notes in 98 **Am. Dec.** 126; 87 **Am. St. Rep.** 19.]

From Coos: JOHN S. COKE, Judge.

Department 2.

The defendant was convicted of the crime of larceny of public money, sentenced to pay a fine of $1,329.90, and be confined in the penitentiary from one to seven years. Defendant appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. N. C. McLeod.*

For the State there was a brief and an oral argument by *Mr. John F. Hall,* District Attorney.

OLSON, J.—The appellant assigns as error that the indictment is faulty in that it does not describe the character and value of the moneys alleged to have been embezzled, but this point was waived by his counsel on argument in this court. The only point now relied upon is that the verdict of the jury is a general verdict and not sufficiently definite to comply with the provisions of Section 1958, L. O. L.

The indictment charged the defendant, after describing his official status, as follows:

"Did then and there wickedly, willfully, and unlawfully, feloniously and fraudulently take and convert to his own use the sum of six hundred and sixty-four dollars and ninety-five cents, lawful money collected by him and belonging to the county of Coos, and did neglect and refuse to pay the same over to the county treasurer of Coos County, Oregon, or any portion thereof, as by law directed and required, after lawful demand so to do, well knowing that he was not entitled to the same."

Section 1957, L. O. L., defines the crime of larceny of public money by any public official, and Section 1958, L. O. L., contains this provision:

"The amount of money converted, loaned, or neglected, or refused to be paid, must be ascertained by the verdict of the jury as near as may be."

The jury brought in a verdict in the following form, omitting the venue and title:

"We, the jury impaneled to try the above-entitled cause, find the defendant guilty as charged in the indictment. Dated at Coquille City, Coos County, Oregon, this day of June 8, 1918."

Counsel for appellant contends that this verdict contains no finding as required by Section 1958, L. O. L., as to the amount of money embezzled, and, therefore, such verdict is not sufficient upon which to base a sentence.

This seems to be a case of first impression as to the exact point raised by counsel. There seems to be a division of authorities as to whether a verdict of guilty as charged in the indictment is sufficiently definite to fix the amount of money stolen or embezzled, as the case may be. Iowa, Illinois, Ohio, Nebraska and Arizona hold that the verdict of the jury itself must contain a finding in express terms of the amount of money stolen or embezzled. It seems, however, that the weight of authorities in the United States is inclined to the other view. The question of whether or not it was necessary for the jury to find the value of the property stolen in the case of larceny came up in this state in *Howell* v. *State,* 1 Or. 241, in which it was held that it was not necessary for the jury to enter in their verdict the value of the property stolen. *Howell* v. *State,* 1 Or. 241, was quoted in *State* v. *Kelliher,* 32 Or. 240 (50 Pac. 532), on a conviction for larceny. In the latter case Justice BEAN observes:

"But it was early held in this state that, on an indictment for stealing property of a specified value, it was

not necessary for the jury to assess the value in their verdict: *Howell* v. *State,* 1 Or. 242. And this is in harmony with the great weight of authority. A general verdict of guilty affirms the truth of all the material allegations of the indictment, including that of value, so far as the same is material; and, therefore, on a charge of stealing several articles of specified values, such a verdict is a finding that the defendant stole all of them, and that their several values were as averred, or at least that their aggregate value is sufficient to constitute the crime charged."

The cases cited above would absolutely determine the case at bar but for the fact that Section 1958, L. O. L., contains a provision that the amount of money embezzled must be ascertained by the verdict of the jury as near as may be.

Counsel for appellant relies mainly upon cases from Nebraska, Ohio, Illinois and Iowa, but these states in larceny cases hold directly contrary to the decisions of *Howell* v. *State,* 1 Or. 241, and *State* v. *Kelliher,* 32 Or. 240 (50 Pac. 532), and so such decisions have not the force as precedents they otherwise might have. It is a general rule, however, that a verdict of guilty need not specify the degree of the crime of which defendant is convicted, and if a particular degree is charged and the jury desires to find defendant guilty of a lesser degree, the degree should be specified in the verdict; in other words, the verdict of guilty as charged in the indictment finds the defendant guilty of the highest degree therein charged: 16 Corpus Juris, 1109, 1110, and cases therein cited. In this case the indictment charges the embezzlement of a specific sum and the failure to return or turn over any portion thereof. The matter of the amount so embezzled was contested in the lower court. The jury had the amount specifically called to their attention, and when they brought in their verdict

in the form above set out, in effect they made a finding that the defendant had embezzled the exact amount set forth in the indictment. The finding that the defendant was guilty "as charged in the indictment" necessarily had the same effect as if the jury had returned their verdict charging that the defendant was guilty, and then proceeded to enumerate and set forth the exact words, phrases and figures of the indictment. If this had been done by the jury there could be no question that the statute had been absolutely complied with, and it seems that to hold that the language "guilty as charged in the indictment" means anything else than a finding as to all the material facts set forth in the indictment, including necessarily the amount embezzled, would be to deserve Butler's description of the person who could "distinguish and divide a hair 'twixt south and southwest side." The greatest objection made against the administration of criminal law in this country is that technicalities are permitted to defeat the administration of justice. To hold in this case that the jury had not complied with the provisions of Section 1958, L. O. L., would seem to raise a mere technicality above the administration of justice.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued at Pendleton October 29, modified and affirmed December 3, 1918.

LEES *v.* HOBSON.

(176 Pac. 196.)

Fixtures—Mortgagee—Agreement Between Landlord and Tenant.

1. While an agreement between the owner of a lot and the tenant that a building be regarded as personalty is valid and binding as between them, it is not binding on an innocent purchaser or mortgagee, without notice or knowledge of such agreement.

Judgment—Res Judicata—Action for Possession—Title.

2. In an action to replevin a building as personalty, where a mortgagee of the land was not made a party, mortgagee's paramount right to have the building remain on the land could not be adjudicated.

Parties—Real Party in Interest.

3. In an action by a mortgagee to enjoin the removal of a building from land, in accordance with a decree in a replevin action between the owner and a tenant, in which sureties on the bond on appeal of a defeated party in the replevin action are made defendants, such defendants, and not plaintiff, are parties in interest, and plaintiff cannot enjoin defendants from enforcing execution against the sureties, under Section 392, L. O. L.; such sureties not appearing or asking for any relief.

[As to mortgagee's right of action against third persons for removing fixtures, see note in 13 **Am. St. Rep.** 153.]

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is a suit to enjoin the removal of a brick building from a lot in the City of Ontario, and to enjoin execution against the sureties upon an appeal bond.

The history of the case is about as follows: Hobson entered into a contract with Florence O'Connor, whereby he agreed to sell to her what they termed fixtures on the real property involved, consisting of a brick building and appurtenances, retaining title thereto until the purchase price was fully paid, in specified installments. The purchaser having failed to make the payments, Hobson commenced an action to recover

possession of the property, and in a trial to a jury, recovered a judgment for the return of the property, or its value; the value of the building being fixed at $320. The case was appealed to this court, which affirmed the judgment: *Hobson* v. *O'Connor,* 76 Or. 394 (149 Pac. 83). Upon that appeal, O'Connor gave a supersedeas bond, and the mandate of this court directed a judgment against the sureties, as well as the defendant. Thereafter, the defendant undertook to return the property, including the building, to the prevailing party, whereupon, L. Belle Lees began this suit. From the complaint, and the stipulated facts, it appears that on February 5, 1910, Frank R. Welch, the owner of the lot mortgaged the same to one Allison, to secure the payment of a promissory note in the sum of $1,500, and the mortgage was promptly recorded. The record does not disclose the date of the erection of the building, but it does appear that after its construction, and on September 5, 1911, the plaintiff herein purchased the mortgage from Allison, without any notice or knowledge that there was any understanding or agreement to treat the building as personalty. The note and mortgage are still unpaid and unsatisfied.

The trial court made and entered a decree enjoining the defendants from removing the building, and also enjoining them from proceeding against the sureties upon the supersedeas bond. Defendants appeal.

MODIFIED AND AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. C. McGonagill.*

For respondent there was a brief and an oral argument by *Mr. William E. Lees.*

BENSON, J.—1. It is so well established as to call for no citation of authorities, that while an agreement

between the owner of the lot and the tenant, that the building is to be regarded as personalty, is valid and binding, it is equally true that an innocent purchaser, without notice or knowledge of such agreement, cannot be bound thereby. In *Landigan* v. *Mayer,* 32 Or. 245, (51 Pac. 649, 67 Am. St. Rep. 521), we find this language:

"A mortgage is *pro tanto* a purchase, and the *bona fide* mortgagee or assignee of the mortgage, without notice of a prior claim, is entitled to the same protection as a *bona fide* grantee without notice."

2. It is also true that a replevin action, being primarily a possessory action, cannot be sustained for the purpose of trying the right of property: 34 Cyc. 1354; *Taggart* v. *Hart,* Brayt. (Vt.) 215.

The judgment in the former case, to which neither the plaintiff nor her assignor were parties, merely determined that as between the plaintiff and defendant therein, the plaintiff was entitled to the immediate possession of the building, or, if such possession could not be had, to its value as determined by the jury. This plaintiff's paramount right was not in question, and could not be adjudicated. It follows that the trial court did not err in restraining defendants from removing the building and thereby impairing plaintiff's security.

3. That portion of the decree which enjoins defendants from enforcing the judgment against the sureties on the *supersedeas* bond is in a different situation. The sureties are made defendants, and, so far as disclosed by the record, have made no appearance in the case, and have not asked for any relief. Upon this subject, they are the parties in interest, and the plaintiff can have no concern with the effect of the judgment upon them: Section 392, L. O. L.

The decree of the lower court will be modified by eliminating the restraining order so far as it relates to proceedings against the sureties upon the appeal bond, and in other respects it is affirmed.

MODIFIED AND AFFIRMED.

HARRIS, J., absent.

Submitted on briefs November 12, reversed and remanded December 3, 1918.

STATE *v.* LANGFORD.

(176 Pac. 197.)

Parent and Child—Nonsupport of Child—Statutes.

1. Statutes such as Laws of 1917, page 175, amending Laws of 1913, page 472, as amended by Laws of 1915, page 359, which make it an offense for a person without just or sufficient cause to fail to support his children, are intended to compel a father when able to do his full duty, but do not define the duty of a father.

Parent and Child—Support—Father.

2. It is the legal duty of a father to support his child in accordance with his ability and circumstances, etc.

Divorce—Duty to Support—Effect of Decree.

3. A decree of divorce awarding custody of the minor child of the marriage to the mother is not *res judicata* as to the duty of the father to support.

[As to duty of father to support child awarded to mother by divorce decree silent as to maintenance, see notes in 114 Am. St. Rep. 700; Ann. Cas. 1913C, 296; Ann. Cas. 1915D, 813.]

Parent and Child—Duty to Support.

4. The primary obligation on the part of the father to support his child is not taken away by Section 7039, L. O. L., etc., relating to the duty of both parents to maintain their children.

Parent and Child—Support—Obligation.

5. The duty to support offspring is a continuing obligation.

Parent and Child—Support—Statute.

6. In a prosecution under Laws of 1917, page 175, making it an offense for any person without just or sufficient cause to fail to support his children, proof of a complete failure to support is not necessary to conviction; proof of failure to provide adequate support being sufficient.

Parent and Child—Nonsupport—Intent.

7. A wicked intent is not an essential element of the crime of failure to support children denounced by Laws of 1917, page 175.

Parent and Child—Nonsupport—Defense—"Just"—"Just or Sufficient Cause."

8. Under Laws of 1917, page 175, denouncing the offense of failure without just or sufficient cause to support children, the expression "just or sufficient cause" means legal or lawful cause, the word "just" being derived from the Latin "justus," which is from "jus," meaning a legal right; hence, while the law does not require the impossible, the cause for failure to excuse must be lawful cause.

Parent and Child—Nonsupport—Excuse.

9. That a wife has means of her own and supports children is no defense to a prosecution against the husband under Laws of 1917, page 175, for failure, etc.

Parent and Child—Nonsupport—Excuse.

10. The remarriage of the mother of a child after divorce from the father is no defense to a prosecution against the father under Laws of 1917, page 175, for failure to support the child, as that duty does not devolve on the stepfather in the absence of a showing that he stands in *loco parentis*.

Criminal Law—Proof Beyond Reasonable Doubt.

11. A prosecution under Laws of 1917, page 175, for failure to support his child, being a criminal action, the state must prove beyond a reasonable doubt that defendant failed and neglected without just or sufficient cause to support his child.

Parent and Child—Nonsupport—Defenses.

12. Where a father, after divorce from his wife, who was awarded custody of the minor child, remarried, the father is entitled, in a prosecution under Laws of 1917, page 175, making it an offense for any person without just or reasonable cause to fail to support his wife or children, to show his inability to support his second wife, etc., much less the child; the remarriage, which was lawful, having occurred before passage of Laws of 1917, at which time the father was by Laws of 1913, page 472, as amended by Laws of 1915, page 359, excepted from penalty for failure to support such child, etc.

Parent and Child—Nonsupport—Evidence.

13. In a prosecution under Laws of 1917, page 175, for failure to support his minor child of a former marriage custody of which had been awarded the mother, evidence as to the refusal of the father to support the child prior to Laws of 1917, *held* admissible on question whether his failure was without just cause, particularly as failure was no offense under law prior to time Laws of 1917 went into effect, etc.

Witnesses—Cross-examination.

14. The court may on its own motion without objection from counsel exclude cross-examination intended only to humiliate the witness.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc.

George H. Langford was convicted of the crime of failure to support his minor child and he appealed. The indictment is dated June 19, 1917; it was filed June 20, 1917; and it charges that on June 1, 1917, in Clatsop County, Oregon, the defendant did "without just or sufficient cause, fail, refuse and neglect to support his said minor child, Wendell Langford."

The child's parents were married on January 28, 1902; Wendell Langford, the child, was born on June 2, 1905; and the father and mother were divorced on December 6, 1911. The mother married J. T. Jeffries in 1915; and the father married Mrs. June Bosdorfer on November 10, 1916. The trial occurred in September, 1917.

The record presented to us does not contain a copy of the decree of divorce or any satisfactory evidence of the exact terms of the decree so far as it relates to alimony for the divorced wife or maintenance for the child. The testimony supports the statement, however, that the decree provides for alimony and that the defendant was adjudged to be the party in fault, but there is no suggestion as to the amount or as to the time when the alimony is payable. It can be inferred from the evidence that the decree awards the custody of the child to the mother, for the boy lives with his mother; and it is possible to infer also that the decree requires the father to pay some amount of money for the maintenance of the child; but the record does not disclose how much money is to be paid or whether the amount to be paid is payable in gross or in installments.

While the record does not name the place where the decree of divorce was granted, it is probable that the

decree was rendered in Astoria, Clatsop County. The mother resided in Astoria continuously from the date of the divorce until the time of the trial, except for a period of 13 months, when she was employed as a stenographer in Hillsboro, Oregon. The record does not definitely inform us as to the whereabouts of the defendant except to tell us that for a year and a half prior to the date of the trial he had been living in Portland, Oregon, where he was conducting a barber-shop. A reading of the transcript of testimony, however, may leave the impression that although the defendant left Astoria at some time in the early part of 1912, he continued to reside in Oregon.

Upon obtaining a decree, the mother found employment as a clerk in a store during the daytime and she attended business college after working hours. Subsequently she quit clerking in the store and with the aid of funds loaned to her by a sister, the mother of the child gave her entire time to her studies and was able to graduate from the business college. After graduating, she secured employment and earned as much as $60 per month during part of the time. The record does not satisfactorily show whether the mother worked as a stenographer continuously after her marriage to J. T. Jeffries, but it does appear that she had employment during a portion of the time after 1915, and she testified at the trial that she had made arrangements for a place where she expected to work as a public stenographer. The mother furnished all the money used for the support of the child after February, 1912; and the defendant has not contributed any money since that date. The mother's present husband, T. J. Jeffries, was at the time of the trial serving as a captain in the United States Army; but after paying for his own necessary expenses it is probable that only a small por-

tion of his salary remained. The uncontradicted evidence is that the child is not old enough to work.

The defendant is a barber. He conducts a shop in Portland. He testified that he paid a rental of $8.50 per month for the shop and that he earned about $14 per week. He stated that he was in debt and that his earnings were not sufficient to maintain himself and his wife; and that "it has taken all the money" he "can make to support" himself and wife, and "that is the reason why" he could not contribute anything to his child. The present wife testified that the defendant had never purchased any clothes for her since their marriage in 1916, and that he had not bought any for himself except a pair of trousers; and she also stated that she had purchased a hat for him with money which she had earned by making a dress for some other person.

The defendant claimed that his arm had been dislocated about three years prior to the trial; that his hands were inclined to cramp, making him "heavy-handed"; and that he had been suffering with lumbago.

At the time of, or soon after the divorce, a city lot was deeded to the mother of the child and the defendant was given credit for $100 on account of alimony. In the latter part of 1911, or the early part of 1912, the defendant paid to the boy's mother cash amounting to at least $15, and probably aggregating $20; but he has not paid any sum whatever to the mother, for her or for the boy, since February, 1912.

The defendant claims that in May, 1912, he asked the boy's mother where Wendell was and that she told him that she had sent the boy to South America and that the defendant could not see the boy any more. The defendant says that he neither knew where the boy was nor saw him from about May, 1912, until July, 1917, although he admitted that he knew the boy's mother

had married J. T. Jeffries and was living in Astoria. The undisputed evidence is that the boy had been attending the public schools in Astoria for at least two years and it is a fair inference to say that the evidence indicates that the child had been attending the schools for three years preceding the date of the trial; and, moreover, the evidence justifies the inference that Wendell had been in Astoria most of the time, if not all the time, after his parents were divorced.

The boy's mother stated that while she had asked the defendant to assist in supporting the boy prior to "the last three years," she had not made any demand within the last three years upon the defendant to support the child, because she had left the matter with her attorney. F. M. De Neffe, an attorney, testified that he called upon the defendant on May 12, 1917, in behalf of Mrs. Jeffries

"to see whether he would not pay something on what the decree required that he should pay for the minor child, and I called at his barber-shop on Lombard Street and, I think, Peninsula Station; and I talked with him and told him what I was there for, to see whether he would not pay something on the decree, on the judgment, and he said that he would not pay the judgment; and I asked him whether or not he would not pay part of it, if he could not pay it all, and he said, no, he would not pay anything; and I told him that Mrs. Jeffries said that the child needed different things and she would like to get what she could anyway, and I asked him whether he could not pay $25 or $5. He said, no, he would not pay anything; and I asked him whether or not he would not pay something this month, or a small amount each month, $5, if he could not pay more, and he said no, he would not pay anything. That is about all that was said."

REVERSED AND REMANDED.

For appellant there was a brief submitted by *Mr. Richard Talboy* and *Messrs. Norblad & Hesse.*

For the State there was a brief submitted by *Mr. Ed C. Judd,* District Attorney, and *Messrs. G. C. & A. C. Fulton.*

HARRIS, J.—In 1907, the legislature enacted a statute entitled

"An act to punish a person for failing or refusing without just or sufficient cause, to support his wife or children, or to provide for their support": Chapter 78, Laws 1907.

Section 1, afterwards carried into Lord's Oregon Laws as Section 2166, reads thus:

"Any man who, without just or sufficient cause, shall fail to support his wife or child shall be deemed guilty of a misdemeanor, and shall be punished therefor by imprisonment in the county jail for not less than thirty days, nor more than one year."

In 1913, the legislature repealed Chapter 78, Laws of 1907, and enacted a new statute, Section 1 of which made it a crime punishable by imprisonment in the penitentiary or in the county jail for any person to fail or neglect, without just or sufficient cause, to support his wife or children: Chapter 244, Laws 1913.

In 1915, Section 1 of the act of 1913 was amended to read as follows:

"Any person who, without just or sufficient cause, shall fail or neglect to support his wife or children shall be deemed guilty of a felony and shall be punished therefor by confinement in the State prison for not less than one year nor more than three years, or by imprisonment in the county jail for not less than 30 days nor more than one year; provided, however, that when a decree of divorce between husband and wife has

been heretofore or shall be hereafter granted by any competent court, and the custody of the child or children, the issue of said marriage relations, has been or may be given by the court to either party to the suit, then the provisions of this Act shall not apply as to the other party to said suit": Chapter 249, Laws 1915.

In 1917, the legislature amended Section 1 of the act of 1915 so as to make it read thus:

"Any person who, without just or sufficient cause, shall fail or neglect to support his wife, or female children under the age of eighteen years, or male children under the age of sixteen years, shall be deemed guilty of a felony and shall be punished therefor by confinement in the State prison for not more than one year, or by imprisonment in the county jail for not less than thirty days nor more than one year": Chapter 136, Laws 1917.

The act of 1917 did not become effective until May 20, 1917: *Cooper* v. *Fox,* 87 Or. 657, 661 (171 Pac. 408).

1. Many of the states have statutes making it a punishable offense for a father to fail to support his child or for a husband to fail to support his wife. The wording of most of the enactments coming under our observation is, in some particulars, different from the language of our statute; and, yet, nearly all the legislative acts passed in the different states are quite alike in substance. Different motives have been assigned for the adoption of legislation which penalizes a father for failing to support his wife or child. It is said by some courts and text-writers that the primary object is to redress a public grievance by relieving the public from the burden of caring for a helpless child or an indigent wife; while others take the view that these statutes, though criminal rather than civil in kind, are in the final analysis really designed as a remedy for the benefit of the wife or the child, in addition to the

remedies afforded by civil proceedings: *People* v. *Malsch,* 119 Mich. 112 (77 N. W. 638, 75 Am. St. Rep. 381); *State* v. *Waller,* 90 Kan. 829 (136 Pac. 215, 49 L. R. A. (N. S.) 588); 8 R. C. L. 306; 13 R. C. L. 1191. Notwithstanding some jurists may say that the theoretical ultimate purpose of nonsupport statutes is for the benefit of the public, and others may take the view that this sort of legislation is for the benefit of the wife or child, yet all can probably concur in the statement that the practical result sought to be accomplished is to compel the husband and the father, when able, to do his full duty. In *State* v. *Gillmore,* 88 Kan. 835 (129 Pac. 1123, 47 L. R. A. (N. S.) 226), the court pithily says:

"The object of the statute was to compel the husband, if he were able to do so, to support his wife and children."

Our nonsupport statute does not create a new duty; nor does it enlarge any previous obligation. When it enacted the statute, the legislature did not attempt to define the duty of the father or husband, but it assumed that the law had already imposed a duty upon him and, acting on such assumption, the lawmakers wrote and adopted a statute penalizing the father and the husband for any failure to perform such existent duty: *People* v. *Pierson,* 176 N. Y. 201 (68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187). We must, therefore, look beyond Chapter 136, Laws of 1917, to ascertain the legal duty imposed upon fatherhood.

2. It is the legal duty of a father to support his child. Some early American cases, like *Kelly* v. *Davis,* 49 N. H. 176 (6 Am. Rep. 499, 501), hold that "there is no legal obligation on a parent to maintain his child, independent of the statutes"; but this narrow and unnatural doctrine is repudiated by the great majority of American courts: *Ward* v. *Goodrich,* 34 Colo. 369

(82 Pac. 701, 114 Am. St. Rep. 167, 2 L. R. A. (N. S.) 201); *Rounds Brothers* v. *McDaniel*, 133 Ky. 669, (118 S. W. 956, 134 Am. St. Rep. 482, 19 Ann. Cas. 326); *Alvey* v. *Hartwig*, 106 Md. 254 (67 Atl. 132, 14 Ann. Cas. 250, 11 L. R. A. (N. S.) 678); *Spencer* v. *Spencer*, 97 Minn. 56 (105 N. W. 483, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, 2 L. R. A. (N. S.) 851); 29 Cyc. 1606; 20 R. C. L. 622). In this jurisdiction we have a statute which affirmatively declares that

"Parents shall be bound to maintain their children when poor and unable to work for themselves; * * ": Section 7054, L. O. L.

When we say that it is the legal duty of a parent to support his child, we are dealing with a duty in the abstract; but when called upon to determine whether the duty has been performed in a given case we must remember that what would be a complete performance in one case might be only a partial performance of the parental duty in another case. In other words, the obligation of the father must be measured with reference to his ability, honestly exercised, and with regard to his financial resources. If the child is able to earn its own support, in whole or in part, the father is not obliged to support his offspring in idleness, but he is bound to furnish such portion as the child cannot, all things being considered, earn by reasonable effort: *Graham* v. *Graham*, 38 Colo. 453 (88 Pac. 852, 12 Ann. Cas. 137, 8 L. R. A. (N. S.) 1270); *Matter of Ryder*, 11 Paige (N. Y.) 185 (42 Am. Dec. 109). The parent performs his duty when he provides for his child whatever is necessary for its suitable clothing and maintenance according to their situation and condition in life: *De Brauwere* v. *De Brauwere*, 203 N. Y. 460 (96 N. E. 722, 38 L. R. A. (N. S.) 508; *State* v. *Bess*, 44 Utah, 39 (137 Pac. 829); *Hedin* v. *Suburban Ry. Co.*, 26

Or. 155, 160 (37 Pac. 540). An excellent statement of the rule in its broad outlines is found in *State* v. *Waller*, 90 Kan. 829 (136 Pac. 215, 49 L. R. A. (N. S.) 588, 595), where the court says:

"Sustenance which barely meets animal needs, which does no more than relieve the pangs of hunger, cover nakedness, and afford shelter from the elements, is not support or maintenance. He is obliged to provide such a place of abode, such furniture, such articles of food, wearing apparel, and use, such medicines, medical attention, and nursing, such means for the education of children, and such social protection and opportunity as comport with the health, comfort, welfare, and normal living of human beings according to present standards of civilization, considering his own means, earning capacity, and station in life."

3, 4. The courts do not agree in their interpretation of the common law as to the burden of this duty which devolves upon parenthood. Some courts declare that the burden rests upon the parents equally, while others hold that the duty devolves primarily upon the father and secondarily upon the mother: *Alvey* v. *Hartwig*, 106 Md. 254 (67 Atl. 132, 14 Ann. Cas. 250, 1 L. R. A. (N. S.) 678); *Hunter* v. *State*, 10 Okl. Cr. 119 (134 Pac. 1134, Ann. Cas. 1916A, 612, L. R. A. 1915A, 564); 29 Cyc. 1606. Legislation has been enacted in some states placing the burden upon the father and mother equally. The State of Washington has a statute providing that:

"The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately": Ballinger's Ann. Codes & St., § 4508.

And when called upon to construe that statute the Supreme Court of that state ruled that:

"This obligation is the same after divorce as before, unless the decree of separation provides otherwise. It follows from this that the obligation of the father and mother in this state in relation to the maintenance and support of their minor children is joint and several, and not primary and secondary as at common law": *Hector* v. *Hector,* 51 Wash. 434 (99 Pac. 13, 15).

It is to be noted, however, that we have a statute exactly like the Washington enactment: Section 7039, L. O. L.; and this court has ruled that this provision of the code "was intended for the protection of creditors of the husband and wife, and not to change the common-law rule respecting their liability as between each other concerning such matters": *Taylor* v. *Taylor,* 54 Or. 560, 583 (103 Pac. 524, 532). It must be remembered, however, that in addition to Section 7054, L. O. L., which states that "*Parents* shall be bound to maintain their children" there is another section of the Code which declares that:

"Henceforth the rights and responsibilities of the parents, in the absence of misconduct, shall be equal, and the mother shall be as fully entitled to the custody and control of the children and their earnings as the father, and in case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death": Section 7057, L. O. L. See *MacDonald* v. *O'Reilly,* 45 Or. 589, 593 (78 Pac. 753).

The record presented by the instant appeal does not require us to determine whether the burden of support, when considered in the abstract, rests equally upon the parents or whether it is primarily placed upon the father and secondarily upon the mother; but it is sufficient, for the purposes of the instant case, to say that, whether the decree of divorce fixed a definite sum to be paid by the defendant as maintenance for the child

or whether the decree is silent upon that subject, there is some duty resting upon the defendant. If the decree is silent upon the subject of maintenance for the child there is nevertheless, as we shall subsequently show, a duty resting upon the father. In brief, the record presents a situation where the decree either requires the father to pay a fixed amount as maintenance for the child or it is silent upon the subject; but in either event the situation is one which involves a duty resting upon the defendant. If the decree does not speak of maintenance for the boy, then the defendant owes the same duty, in the abstract, that he owed prior to the decree whether that duty is the whole or only half the burden.

Cases concerning the support of children after divorce of the parents may be divided into three classes: (1) Where the decree is silent as to both the custody and the maintenance of the child; (2) where the decree provides for the custody of the child but is silent as to its maintenance; and (3) where the decree not only provides for the custody but also requires the payment of money for the maintenance of the child. In the first class of cases, the general rule is that the obligation of the father is, after divorce, exactly the same as it was before dissolution of the marriage contract: *Spencer* v. *Spencer*, 97 Minn. 56 (105 N. W. 483, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, 2 L. R. A. (N. S.) 851). In the second class of cases there is a difference of judicial opinion. One line of authorities proceeds upon the theory that the duty of the father to support the child and the obligation of the latter to serve the former present reciprocal rights and duties, and that therefore to award the custody of the child to the mother is to deprive the father of the child's services and hence the loss of the right to the services of the child operates

as a release from the duty to support; but a majority of the well-considered precedents denounce and condemn this cold and illogical doctrine, which not only ignores the rights and welfare of the child, but also enables an unfaithful husband and unnatural father to compel his wife to divorce him, on account of grievous wrongs done by him, with the assurance given to him in advance that when she does divorce him she will not have lost the maternal instinct, but will cling to the child, and thus enable him further to wrong her by cowardly casting his burden upon her; for the great weight of judicial authority is to the effect that a father is not released from his obligation to support his child by reason of the fact that the mother has secured a divorce and been awarded the custody of the child by a decree which makes no provision for the child's maintenance: *Evans* v. *Evans,* 125 Tenn. 112 (140 S. W. 745, Ann. Cas. 1913C, 294); *Spencer* v. *Spencer,* 97 Minn. 56 (105 N. W. 483, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, 2 L. R. A. (N. S.) 851); *Alvey* v. *Hartwig,* 106 Md. 254 (67 Atl. 132, 14 Ann. Cas. 250, 11 L. R. A. (N. S.) 678); *Buckminster* v. *Buckminster,* 38 Vt. 248 (88 Am. Dec. 652); *Gibson* v. *Gibson,* 18 Wash. 489 (51 Pac. 1041, 40 L. R. A. 587); 9 R. C. L. 480. See, also, *McFarlane* v. *McFarlane,* 43 Or. 477 485 (73 Pac. 203, 75 Pac. 139); and *Miller* v. *Miller,* 67 Or. 259, 367 (136 Pac. 15). The decree of divorce was not *res adjudicata* as to the question of maintenance: *Graham* v. *Graham,* 38 Colo. 453 (88 Pac. 852, 12 Ann. Cas. 137, 18 L. R. A. (N. S.) 1270); *Connett* v. *Connett,* 81 Neb. 777 (116 N. W. 658); Section 514, L. O. L.; *Henderson* v. *Henderson,* 37 Or. 141, 145 (60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741, 48 L. R. A. 766). If, therefore, the record presented here does not justify the inference that the decree requires the defendant to pay

a certain sum in installments or otherwise for the support of the boy and if in truth the decree does not provide for maintenance of the child, the defendant nevertheless owes a duty to contribute to the support of his child. If the decree provides for both the custody and maintenance of the boy, then the instant action naturally falls in the third class of cases. It is neither contended nor even suggested that the decree in terms releases the defendant from any obligation to contribute to the support of Wendell, and, hence, from whatever angle one may view the problem, we find the defendant accompanied with an obligation to contribute to the support of his child; and the statute says that for a failure to perform that duty the defendant may be punished.

5, 6. This duty to support the offspring is a continuing obligation: *State* v. *Gillmore,* 88 Kan. 835 (129 Pac. 1123, 47 L. R. A. (N. S.) 217); *State* v. *Witham,* 70 Wis. 473 (35 N. W. 934). Although the language of the statute is "shall fail or neglect to support," still it is not necessary for the state to prove that the father has completely failed, but, even though some support has been furnished, the crime is nevertheless proved by showing that the parent has failed to provide adequate support. The statute is violated not only where there is a complete failure to support, but also where there is a partial failure: *Dempsey* v. *State,* 108 Ark. 76 (157 S. W. 734).

7, 8. A wicked intent is not an essential element of the crime of failure to support (36 L. R. A. (N. S.) 633, note, 8 R. C. L. 309); but as ruled in *Dempsey* v. *State,* 108 Ark. 76 (157 S. W. 734), where a statute substantially like ours was considered, the failure spoken of in the act means "a willful or negligent failure to provide, and not mere failure on account of inability."

The defendant is not required to do the impossible (*Poole* v. *People,* 24 Colo. 510 (52 Pac. 1025, 65 Am. St. Rep. 245; 8 R. C. L. 309); but to employ language approved in *State* v. *McPherson,* 72 Wash. 371 (130 Pac. 481, Ann. Cas. 1914D, 587), it is the duty of the father "to do the best he can" to support his child "in the manner suitable to his station and circumstances."

To escape the penalty of the statute, the failure must be "without just or sufficient cause." In 4 Words and Phrases, 3895, it is said that:

"The word 'just' is derived from the Latin 'justus,' which is from the Latin 'jus,' which means a right, and more technically a legal right—a law."

The expressions "just cause" and "sufficient cause" as used in the statute now under discussion mean legal cause or lawful cause; and hence a failure to support a child is without "just and sufficient cause," unless such failure can be said to be the result of a legal or lawful cause: *State* v. *Bess,* 44 Utah, 39 (137 Pac. 829); *State* v. *Baker,* 112 La. 801 (36 South. 703); *State* v. *Dvoracek,* 140 Iowa, 266 (118 N. W. 399). See, also, *Bregman* v. *Kress* (81 N. Y. Supp. 1072, 83 App. Div. 1); *State* v. *Duluth,* 53 Minn. 238 (55 N. W. 118, 39 Am. St. Rep. 595); *School District* v. *Thompson,* 5 Minn. 280 (Gil. 221); *Roseburg Ry. Co.* v. *Nosler,* 37 Or. 299, 303 (60 Pac. 904); 24 Cyc. 381; 37 Cyc. 516.

9, 10. The fact that the wife has means of her own is not of itself a defense to an indictment against the father: *Poole* v. *People,* 24 Colo. 510 (52 Pac. 1025, 65 Am. St. Rep. 245). Because of the peculiar language found in the statutes of a very few states it has been held that support voluntarily furnished by a third person, or by one parent, relieves the other parent from criminal liability for a failure to contribute to the sup-

port of the child: *Baldwin* v. *State,* 118 Ga. 328 (45 S. E. 399; *Williams* v. *State,* 126 Ga. 637 (55 S. E. 480); *State* v. *Thornton,* 232 Mo. 298 (134 S. W. 519, 32 L. R. A. (N. S.) 841); but according to the great weight of judicial opinion and according to what we believe is the plain intent of our statute, the fact that the mother alone or together with other persons furnished all the support needed for the child does not constitute just or sufficient cause for any failure by the father: *Hunter* v. *State,* 10 Okl. Cr. 119 (134 Pac. 1134, Ann. Cas. 9116A, 612, L. R. A. 1915A, 564); *State* v. *Bess,* 44 Utah, 39 (137 Pac. 829); *State* v. *Waller,* 90 Kan. 829 (136 Pac. 215, 49 L. R. A. (N. S.) 588); 20 R. C. L. 623. The remarriage of the mother does not of itself excuse any failure of the defendant, for the law does not impose upon the stepfather the duty of supporting the child, in the absence of a showing that the stepfather is standing *in loco parentis: Gerber* v. *Bauerline,* 17 Or. 115, 117 (19 Pac. 849); *Wilson's Guardianship,* 40 Or. 353, 358 (68 Pac. 393, 69 Pac. 439); *In re Harris,* 16 Ariz. 1 (140 Pac. 825, Ann. Cas. 1916A, 1175); 13 R. C. L. 1189; 20 R. C. L. 594; 21 Cyc. 1152.

11, 12. As already stated, the defendant offered evidence showing, as he claims, that his earnings were not even sufficient adequately to support himself and his present wife and he requested the court to instruct the jury that it was his duty to support his wife, and that if he was unable to do any more than to support himself and wife, it would be a just and sufficient cause for his failure to support the child while living in another home. The prosecution took the opposite view and insisted that the fact of the second marriage was immaterial; and the State also contended that the jury was not entitled to consider any evidence concerning the ability of the defendant's present wife to work or to consider

his obligations to her in connection with the question of "just or sufficient cause." The position taken by the plaintiff and the view entertained by the court are illustrated by what occurred when the witness Mrs. Langford, the present wife of the defendant, was being interrogated:

"Q. Have you been able physically to render any assistance?

"A. I am not able physically to make my own living, no, sir, I am not.

"Q. What is the matter with you, Mrs. Langford?

"A. Two years ago this coming—

"Mr. Fulton: Well, I object to this. It comes down to this proposition, as I understand it, now, whether a man can leave his child to starve in order to afford another wife. If that is the law, all right—

"The Court: Well, I don't think that is any excuse for failure to support the child."

Moreover, the court instructed the jury that the first duty of a father is to support his children, and that while he has such children requiring his support, "he has no legal right to voluntarily place himself in such a position that he cannot perform this duty for them"; and that, therefore, the fact that the defendant has assumed the burden of supporting a wife would not be a defense and the jury "should not take that fact into consideration in determining the guilt or innocence of the defendant."

The marriage of the defendant was lawful. No law of man, statutory or otherwise, prohibited the defendant from again marrying; but upon the contrary the law recognizes his right to remarry, provided only such remarriage occurs after the expiration of a certain period: Section 515, L. O. L., as amended by Chapter 236, Laws 1913. Moreover, when the defendant remarried, the act of 1915 was in effect and he was one of the persons embraced by the proviso of that statute. The

fact that the defendant was the father of a living child to whom he owed the duty to furnish support did not operate as a legal obstacle to remarriage. The moment the defendant remarried he incurred an obligation to support his wife and a failure, without "just or sufficient cause," to fulfill that obligation constitutes a crime for which he can be punished. The duty now resting upon the defendant to support the present wife is no different from the duty that rested upon him to support his former wife during the period of their married life from 1902 to 1911. The defendant cannot, of course, be deprived of support for himself, because to do so would be to deprive him of the ability to support either himself or his wife or child. If Wendell now lived in the home of the defendant, the latter's obligation to support his child and his present wife would be exactly the same as was his obligation to support the child and its mother when both of them lived with him prior to the divorce. While it is true that the duty of the defendant to support his child continues after divorce, even though the mother has been awarded the custody of the child, it is also true that in the enforcement of this duty the court will consider all the circumstances, and, as stated in *Buckminster* v. *Buckminster,* 38 Vt. 248, 252 (88 Am. Dec. 652), will not "disregard the rights of the husband and his new relations and duties to others." The defendant not only has a right to support himself and wife and maintain his home, but it is also his duty to do so. If the child lived in the home of the father, the earnings would naturally be shared in common by the child, the father and the wife, but the difficult problem arises out of the fact that the child lives in another home, coupled with the circumstance that the defendant contends that his earnings are not sufficient to maintain his own home. The defendant must "do the best he can" to

perform his whole duty to his wife and to his child; but if after doing "the best he can" his earnings are insufficient to support himself and wife that fact furnishes "just or sufficient cause" within the meaning of the statute. It must be remembered that this is a criminal action and that it must be proved beyond a reasonable doubt that the defendant willfully failed and neglected without just or sufficient cause to support his child; 21 Cyc. 1614; *State* v. *Bess,* 44 Utah, 39 (137 Pac. 829); but if this were a civil proceeding to collect unpaid alimony or unpaid maintenance, the element of willful failure and that of "just or sufficient cause" are not essential: *State* v. *Bess,* 44 Utah, 39 (137 Pac. 829, 832). The case of *State* v. *Bess* is in its main features much like the instant action. The parents had six children—four girls and two boys. A decree of divorce gave the mother the custody of the four girls and awarded her $40 per month as alimony, while the father was granted the custody of the two boys. The father was convicted of failure to support three of the girls. There was testimony to the effect that his earnings were not sufficient to support himself and two boys. The court reversed the judgment with directions to dismiss the action, after saying in the course of the opinion:

"We think the evidence wholly fails to show willful neglect on his part as contemplated by the statute to provide for and support the children mentioned in the information. True, evidence was introduced showing that he failed to contribute anything for their support; but the evidence also shows that the current and necessary expenses of himself and two boys far exceeded his earnings during the time covered by the information, hence his neglect in that regard was not without "just excuse."

We conclude, therefore, that the instruction given to the jury was erroneous; and we also conclude that the

defendant was entitled to have his present wife tell about her physical condition, for the reason that her ability to work necessarily affects his duty to support her.

13. The testimony of F. M. De Neffe was competent and so was the testimony of Mrs. J. T. Jeffries when she told the jury that she had supported the child since the divorce and that the defendant had not, "contributed any sum whatever." The court explained to the jury that the defendant would not be liable for any failure or neglect to support, "occurring prior to the 21st day of May, 1917, or since the date of the indictment." One of the main issues involved was whether the defendant had failed after doing the best he could under the circumstances, or whether he had simply neglected or willfully failed to provide support, and although he could not have been lawfully convicted of a failure occurring while the act of 1915 was in effect, it was nevertheless proper to inform the jury about his conduct prior to May 20, 1917, so that the jury could better determine the reason for his failure from "May 21st" to June 19th, the date of the indictment. If for five years he willfully failed to support, the jury had a right to consider it; and if, as testified by F. M. De Neffe, the defendant absolutely refused to aid in supporting his son, the jury had a right to know it. This evidence does not transgress the rule prohibiting evidence of other crimes. Indeed, the defendant's failure to support during the time the act of 1915 was in effect was not punishable because he was in the excepted class. The identical question presented by the testimony of F. M. De Neffe is decided adversely to the defendant in *Commonwealth* v. *Burlington,* 136 Mass. 435. See, also, *State* v. *Ransell,* 41 Conn. 433; *Firmeis* v. *State,*

61 Wis. 140 (20 N. W. 663); *State* v. *Gillmore,* 88 Kan. 835 (129 Pac. 1123, 47 L. R. A. (N. S.) 217).

14. Inasmuch as the cause must be remanded for a new trial it is fitting to observe that the cross-examination found on page 16 of the transcript was plainly designed for no purpose other than to humiliate the witness; and since the questions referred to were not competent for any purpose in this action, the court may with propriety act on its own initiative and, without waiting for an objection from opposing counsel, interrupt any attempt to repeat the questions.

It will not be necessary specifically to notice any other assignment of error relating to the admission or rejection of evidence or to instructions given or refused by the court, for the reason that the foregoing discussion sufficiently indicates our views upon the questions involved in those assignments of error. We take it for granted that the trial court will compel a strict observance of all the rules governing trials and we also assume that upon a retrial there will be a mutual disposition upon the part of counsel to refrain from indulging in provocative or retaliatory remarks which give off much heat, but afford no light; and since we do not anticipate a repetition of certain statements found in the record we conclude that we are justified in believing that it is quite unnecessary to recite or discuss any of such statements.

The judgment is reversed and the cause remanded for a new trial. REVERSED AND REMANDED.

Argued at Pendleton October 29, affirmed December 10, 1918.

WARD *v.* SEAWEARD.

(176 Pac. 422.)

Waters and Watercourses—Flowage — Ditches — Injunction—Injury Caused by Plaintiff's Act.

1. If plaintiff willfully stopped up drainage ditch used by defendant, thereby necessitating and producing injury to his own land, when waste water from defendant's irrigation operations escaped and flowed over it, plaintiff could not restrain defendant from permitting such escape.

[As to land owners' rights to protect themselves by dams, levees and other means, see note in 97 **Am. Dec.** 565.]

From Malheur: DALTON BIGGS, Judge.

In Banc.

This is a suit by John A. Ward against J. H. Seaweard. From a decree for plaintiff, defendant appeals. Affirmed.

For appellant there was a brief and an oral argument by *Mr. C. McGonagill.*

For respondent there was a brief with oral arguments by *Messrs. McCulloch & Wood.*

McBRIDE, C. J.—1. This is a suit to restrain defendant from permitting the waste water from his irrigating operations from escaping and flowing over and upon plaintiff's land to the injury of said premises.

The answer is a general denial, a plea of a prescriptive right to flow the same, as defendant claims he has been accustomed to do for the past fifteen years, and a plea that plaintiff and another had willfully stopped the drainage ditch used by defendant, thereby necessitating and producing the injury complained of. There are no new propositions of law involved. Each defense urged is legitimate and if supported by the testi-

mony would bar the relief sought by the plaintiff in this suit. The court below found in favor of plaintiff on the issues presented and we have therefore to consider the case upon the facts disclosed by the testimony, which we have read, re-read and carefully considered. We are of the opinion after such examination that the findings of the court below are correct and that the decree should be affirmed. A detailed statement of the testimony would be of no value and is therefore omitted.

Decree affirmed.

HARRIS, J., absent.

Argued October 10, affirmed December 10, 1918.

BOULBY *v.* COLUMBIA CONTRACT CO.*

(176 Pac. 422.)

Negligence—Dangerous Premises—Jury Question.

1. In an action for personal injury, caused by defendant's alleged negligence in not sufficiently guarding a path used by the public for many years, next to which defendant had made a deep and dangerous excavation, evidence *held* sufficient to take the case to the jury.

[As to land owner's liability to persons injured by dangerous premises, see note in 31 **Am. St. Rep.** 524.]

From Columbia: GEORGE R. BAGLEY, Judge.

Department 2.

The plaintiff alleges that the defendant is an Oregon corporation engaged in operating a rock quarry and mill within the city limits of St. Helens in Columbia County, and owning certain lots on Hemlock Street;

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*Authorities discussing the question of liability for dangerous condition of private grounds lying open beside a highway or frequented path are collated in notes in 26 **L. R. A.** 686 and 5 **L. R. A. (N. S.)** 733. REPORTER.

that leading from the business section of St. Helens westerly over and across the premises of the defendant to the Columbia County Lumber Company's sawmill and the St. Helens Creosoting Company's plant there was a certain well-defined and traveled footpath or trail which for many years had constantly been used by the public in passing to and from said localities and over and across the premises of the defendant, with the full knowledge, consent and approval of the defendant. It is further alleged that in operating its quarry previous to the accident the defendant had recently excavated along the south side of the footpath or trail all of the rock and earth in Hemlock Street, to a distance of within a very few feet of said trail and at certain points thereon within less than three or four feet, and to a depth of forty feet, with a perpendicular and precipitous bank adjacent to the trail; that at such points the trail is steep; that at a place thereon about twenty-eight feet from the street line the excavation extends to within three feet of the trail; that by reason thereof the trail became exceedingly unsafe to the traveling public; that the defendant knew of the dangerous condition of the trail which was caused by its own recent excavation; that it was its duty to use reasonable or ordinary care to safeguard the public from the danger of falling into said excavation while passing along and over said trail; that the defendant negligently and carelessly failed and neglected to take any precautions to erect any safeguard or to warn the public and those using the trail, of its dangerous condition or to maintain any fence, guard or railing between the edge of the bluff and the trail or to erect or maintain any sign to give warning of its dangerous condition and knowingly and carelessly maintained a dangerous, unguarded excavation and pathway; that the plaintiff was an able-bodied laborer; that on or about December 1, 1916,

while rightfully traveling upon the path or trail in a careful, cautious and prudent manner, about 5:30 A. M., by reason of the dangerous, unsafe and unguarded condition of the trail and excavation and the negligent acts and omissions of the defendant, plaintiff fell into said excavation and suffered serious injuries; that the negligent acts and omissions of the defendant were the proximate cause of his injuries.

The defendant filed an answer, admitting the ownership of the property at the place where the accident happened as alleged in the complaint, and that while going across the property of the defendant plaintiff fell and received his injuries, but denying all other allegations of the complaint. For a further and separate answer defendant alleges that at the time of his injuries the plaintiff was not in the employ of the defendant but was performing certain work in the city of St. Helens and was going from his home to the city, about 5:30 A. M.; that it was then very dark; that plaintiff had no light or other means of ascertaining where he was walking while going over the trail; that by reason thereof he fell into the rock quarry of the defendant; that near the place where the accident occurred and at the time thereof, the defendant had posted notices upon its property warning all persons against trespassing thereon; that the plaintiff had no right to be upon the premises and was a trespasser; that the defendant did not owe any duty to the plaintiff; that the plaintiff proceeded without any right and was guilty of negligence contributing to his injury; that he failed to give any care or attention as to where he was going or to carry any light to guide his footsteps; that his injuries were the result of an unavoidable accident and due to the negligence of the plaintiff in trespassing upon defendant's property when it was dark, and without any light.

The reply traverses all of the material allegations of the answer. A trial was had and the jury returned a verdict in favor of the plaintiff for the sum of $4,500, upon which judgment was entered and from which the defendant appeals. There are seven different assignments of error, but the defendant apparently relies upon the failure of the court to sustain its motions for nonsuit and for a directed verdict. AFFIRMED

For appellant there was a brief over the name of *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Schuyler C. Spencer.*

For respondent there was a brief and an oral argument by *Mr. Glen R. Metsker.*

JOHNS, J.—1. Under exhaustive instructions all of the material issues were fully and fairly submitted to the jury and the only question to be decided on this appeal is whether or not there is sufficient evidence to sustain the verdict.

John Hugh Gage testified that for about fourteen years he had been familiar with the premises "around about the quarry up there"; that the trail leads from St. Helens up towards Milton Creek; that he had used the trail while "working at the little mill, and to and from the quarry, * * going up in the morning and coming back at night"; that for six days in the week at morning and night the laborers that worked in the little mill used the trail; that he worked there in the winter; that "it was twenty minutes past six when I got home." In answer to the question, "Did you travel in the dark?" he replied, "I did a good many times; I didn't carry a lantern." Extracts from his testimony follow:

"Q. Which one of the two trails would be the one which people would naturally follow, or easiest to get over?

"A. The one which Mr. Boulby used because it was dry. * *

"Q. This old sign you saw, was there anything on that warning anyone to keep off the premises?

"A. It said danger from blasting.

"Q. That is all that was on it?

"A. Yes, sir.

"Q. Now, where that fence crossed the trail did you put any gate there or anything else for people to walk through?

"A. A plank over the fence.

"Q. How long did you maintain it there?

"A. Until the fence was there. * *

"Q. You took out the stiles and fenced it on both sides and left it open there?

"A. Yes, sir."

E. E. Quick testified that he had lived at St. Helens for about thirty-two years; was county school superintendent for two terms, county clerk for three terms and county treasurer for two terms; that he had known the trail for about thirty-five years; that "in those days it was used quite frequently by various residents of the town going back and forth to Milton Creek and up to Warren." Quick gave further testimony as follows:

"Q. Do you know what route they take when they go to and from St. Helens?

"A. They usually follow that trail. * *

"Q. Boulby didn't have to come that way?

"A. I don't know as he would have to. It is probably a shorter route for him to come that way."

Magnus Saxon testified that he had lived in Columbia County for thirty-three years and for the last eight years at St. Helens, "right up on the bluff there"; that he had traveled the trail since 1884; and that "we used to come into town to get our mail here; that is the only

postoffice we had was at St. Helens." His testimony continued thus:

"Q. When you first traveled that trail how many persons would you say had occasion to use it?

"A. All of us would travel—used to use that trail when we came on foot. * *

"Q. Did he [one Miles] stop the travel or was there a gate put there?

"A. There was a gate and they rocked them. They still kept the path; they had a stile there. * *

"Q. During the time you have known that trail has it been a well-defined trail?

"A. Oh, yes; I have traveled it over thirty years myself. When I worked down town here I used to walk from here home and I always took that trail because it was the shortest cut. * *

"Q. How much farther would it be for him to come if he took that road instead of that trail by that bluff, any farther? * * How much farther would you say?

"A. Maybe six hundred or seven hundred feet at least."

U. S. Despain testified that he had lived at St. Helens for about twenty-five years; that he had known the trail for about fifteen years; that one winter he worked for the mill company and used the trail all of the time. He testified further:

"One summer about sixty worked for Mr. Phillips up there and they all traveled it * * twice a day.

"Q. State whether or not that trail is a well-defined trail.

"A. It always has been ever since I have known it.

"Q. Has it ever been closed since you have known it?

"A. No, sir. * * A few years ago when the people were working at the little mill and the block-maker's there was fifty or sixty or maybe a hundred people traveling it each day. That was three or four years ago. * *

"Q. This route that he took you say is the most practical route?

"A. Yes, sir. * *

"Q. These other trails other than the one that Boulby traveled, are they open?

"A. I don't know of any other trails.

"Q. What is the character of the other trails than through these canyons?

"A. The country is broken and brushy. It is a broken country, several canyons running up through, and water in the slough, and there is several lakes in there.

"Q. At 5:50 o'clock on December the 1st, last year, would it be possible for a man to find his way down through that country?

"A. Not very well; no, sir. * *

"Q. So as a sensible, hard-headed man you would go down by this bluff on this trail and take your chances of falling over that bluff?

"A. Of course the trail had been there so long and people are used to traveling it and the trail is dry and the wagon road would be awful muddy at that time; he could see better out there in the light; that is the fact."

Samuel C. Knighton testified that he was seventy years old; that he had lived at St. Helens "the greater part of the time since he was born"; that he had known the trail for sixty-five years; that he had traveled it frequently; that to the best of his recollection the trail had been used by the public all of that time. We quote from his testimony:

"Q. I will ask you whether or not the trail and route that Mr. Boulby traveled on the morning that he met with his accident is the most direct and practical road between his home and the St. Helens Lumber Company plant in St. Helens?

"A. It surely was. * *

"Q. State whether or not you are able to say that is the identical place where the trail was located in early days.

"A. That is the identical trail that I traveled when I was a boy."

T. C. Watts testified that he was seventy years of age and had lived in Columbia County for sixty-three years; that he had held official positions for about sixty years; that he first went over the trail on December 7, 1852; that the place where Boulby fell is very near where the old trail was: Regarding the trail he said, "In the '50's I traveled it every Friday."

The plaintiff testified that he left his home about 5:45 on the morning of the accident; that "it wasn't dark, a man could see where he was going, plain enough." He further testified:

"I never carried a lantern and there was no occasion for it. * * There was no occasion for a light that morning, it was clear as a bell.

"Q. You have seen those trespass signs out there, have you?

"A. No, sir; they were not there at that time. I know there was no signs on that bluff at all.

"Q. During the time that you traveled that trail did you ever meet Mr. Gensman and his boys?

"A. Yes, sir; I would come through there and go home with Mr. Gensman and his boys.

"Q. Did he know you were traveling the same trail?

"A. Yes, sir.

"Q. Did he ever make any objections to your traveling it?

"A. No, sir.

"Q. State whether or not that is the most practical and direct route from your place.

"A. It is; yes, sir. It is the nearest cut I have got.

"Q. Prior to this morning had you ever encountered any fogs in coming through there?

"A. No, sir. * *

"Q. Just about how long this last time had you been working for the St. Helens Lumber Company?

"A. Ten months.

"Q. During that ten months had there been any excavations by the quarry people that came closer to the path?

"A. Not at this end.

"Q. In the same condition all the time?
"A. Yes, sir.
"Q. How long did you live over there where you did live before you got hurt?
"A. About five years.
"Q. And you have practically traveled that trail all that time?
"A. Yes, sir."

George Gensman, as a witness for the defendant, testified that he was superintendent or foreman of the defendant and was "put in charge four years ago last February."

We quote from his testimony:

"Q. What was the condition along there? Was there a kind of bluff there or anything?
"A. A steep bluff, approximately like that along there where it has not been disturbed. It was higher there than here I think.
"Q. What made this path along the bluff there? What made that, and how was it made?
"A. By men traveling over it.
"Q. What men?
"A. Principally our men; and after we were established everybody went over there after the trails were cut open; everybody that did business up in that country went over there. * *
"Q. Do you know what one of the various trails is used the most to get from where Boulby lives over to town?
"A. The trail from where Boulby lives over this way; people coming that way used to travel that he came over, that came from that direction. * *
"Q. Do you come over the same trail that Boulby comes over when he comes?
"A. Yes, sir.
"Q. Do you carry a lantern?
"A. I don't carry a lantern, but I carry a flash-light.
"Q. Did you have your flash-light this morning, do you remember?
"A. I don't remember. I don't think I did. * *

"Q. How long have you lived there?

"A. Something about six years; between six and seven years.

"Q. And you have been working at the quarry here all that time?

"A. Yes, sir.

"Q. And during all of that time you have traveled that same trail Boulby travels?

"A. Yes, sir. There has been a few minor changes made in it, but practically the same trail.

"Q. That is the route you always took?

"A. Yes, sir."

Carl Anand, a witness for and employee of the defendant, testified as follows:

"Q. You say you knew that Boulby used that trail when he was working there?

"A. I have seen him coming over several times. * *

"Q. You have seen people traveling over that trail frequently while you were working there?

"A. I wouldn't say frequently. I have seen several people pass over there.

"Q. Each week and day?

"A. Yes, sir; I do.

"Q. Did you see women and children pass over there?

"A. I seen them one day passing over there.

"Q. It is very easy for people working around the premises there to see people as they walk by?

"A. The place I was working there it was; yes, sir."

The testimony tends to show that the defendant had excavated the bluff within about three feet of the trail; that the pit was about forty feet in depth and that the wall where the accident happened was almost perpendicular. On the morning of the accident the plaintiff left his home at the usual time; the weather was clear and he did not need any light. About the time that he reached the point in the trail from which he fell, a heavy blanket of fog suddenly arose, which obscured his view, as a result of which he lost his path and in searching for the trail he fell over the bluff, sustaining

the injuries upon which the complaint is based. There is no claim or pretense that there was any guard or railing along the rim of the bluff and the testimony is clear that the defendant knew that the trail was in general use by the public. The defendant's foreman testified that he used the trail in going to his work in the early morning and that he knew that the plaintiff used it. He also testified that he never carried a lantern and seldom used his flash-light.

All of the material questions of fact were fully covered by the instructions. It also appears from the record that the jury viewed the premises. We agree with the trial court that it is a close question, but, all things considered, we are of the opinion that there was sufficient evidence to take the case to the jury, and the judgment should be affirmed. Affirmed.

McBride, C. J., and Bean and Olson, JJ., concur.

Argued October 22, affirmed December 10, 1918.

ST. HELENS QUARRY CO. *v.* F. T. CROWE & CO.

(176 Pac. 427.)

Assignments for Benefit of Creditors—Construction of Instrument.

1. Instrument *held* to be bill of sale of business and assets of a partnership, and not an assignment for benefit of creditors, in view of subsequent acts of parties.

Sales—Validity—Consideration.

2. It does not invalidate sale of assets of business that consideration thereof shall be paying of all debts of business; and that a limit is placed upon such amount makes no difference.

From Multnomah: Robert G. Morrow, Judge.

Department 2.

This is an action to recover upon a contract executed for the benefit of a third party. In 1912 the partner-

ship of Vom Cleff & Lundy was engaged in the general business of supplying building materials in the City of Portland, and for the use of their business had a lease on a store building situated on Broadway and 33d Streets for a warehouse, and on a dock at the foot of Linn Avenue, Sellwood. During the month of October of that year the partnership was indebted to over fifty creditors in the sum of over $12,000. They had upon their books in accounts receivable $11,711.76, and on October 8, 1912, had in cash on hand $1,047.82. The principal creditor of said partnership was the defendant F. T. Crowe & Co., who had a claim in the sum of $5,990.40. Among the other creditors were the plaintiff, St. Helens Quarry Co., and the assignor of the plaintiff, Hawthorne Dock Co. On the 8th day of October, 1912, an agreement of writing was entered into, in words and figures as follows:

"This agreement, made and entered into this 8th day of October, 1912, by and between Herman Vom Cleff and J. W. Lundy as partners under the firm name of Vom Cleff & Lundy and as individuals, as parties of the first part, and F. T. Crowe & Co., a Washington corporation legally doing business in the city of Portland, Oregon, as parties of the second part.

"WITNESSETH: That for and in consideration of the sum of One Dollar paid to each of the parties hereto by the other, receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements herein contained, the said parties hereto covenant and agree with each other as follows, to wit:

"First: The parties of the first part agree to set over, transfer and assign to the party of the second part any and all bills or claims outstanding in their favor or to either of them and owed by third parties on account of their business as building material dealers, including all moneys now standing in any bank in the name of the said partnership or in the name of said partners as individuals, or otherwise, for and on ac-

count of said partnership and also including a certain lease on the store building situated on Broadway, near 33rd Street, in the city of Portland, Multnomah County, Oregon, known as Vom Cleff & Lundy's Warehouse.

"Second: The party of the second part agrees to take over all the bills and claims outstanding, as set forth in paragraph one herein, and any and all assets of the said parties of the first part, as a partnership.

"Third: The party of the second part agrees to take care of and dispose of all claims or bills outstanding in favor of third parties against the parties of the first part, as a partnership, it being expressly understood and agreed that the said bills or claims shall consist of only those arising out of or by reason of dealings with the parties of the first part, as a partnership, engaged in supplying building materials, and not otherwise.

"Fourth: It is agreed that the obligations on the part of the parties of the first part, herein mentioned in the preceding paragraph, do not exceed the sum of $12,764.47, and the said parties of the first part further agree that if there are any claims or bills presented exceeding said sum, that they and each of them will take care of and dispose of the same and be held solely responsible therefor, it being the intention of this agreement that the party of the second part shall not be held responsible or liable for any sum exceeding said amount.

"Fifth: In case the party of the second part is successful in collecting the sum of money from said bills and claims so outstanding in favor of the parties of the first part exceeding the total sum of the indebtedness of the parties of the first part on account of their partnership business, the said party of the second part agrees to turn over and deliver to the parties of the first part any and all sums in excess thereof.

"Sixth: And the parties of the first part, and each of them, as a partnership and as individuals, covenant and agree that in case the amount of money derived from the collection of the bills and claims outstanding in their favor from third persons, by the party of the

second part herein by the use of reasonable diligence, shall be less than the total bills or claims outstanding in favor of third parties against the parties of the first part on account of said partnership business, that in that event they and each of them, their heirs and assigns, will be jointly and severally responsible for the total sum of said deficit, and agree to pay said deficit to the party of the second part. And the said parties of the first part further agree that they and each of them will save and keep harmless the said party of the second part on account of any litigation that may arise by reason of the indebtedness on the part of the parties of the first part on account of their partnership business, as aforesaid.

"In Witness Whereof, the parties hereto have caused this instrument to be executed in duplicate this —— day of October, 1912.

"Vom Cleff & Lundy.
"Executed in presence of: By J. W. Lundy. (Seal)
"R. W. Ketchum. J. W. Lundy. (Seal)
"L. P. Thornton. H. Vom Cleff. (Seal)
"F. T. Crowe & Co.
"By F. W. Farrington. (Seal)
"Statutory Agent and Attorney in Fact for Oregon."

In pursuance of said contract defendant took over the accounts and bills receivable of Vom Cleff & Lundy, took over the lease of the warehouse and entered into possession of the same, and took possession of the cash on hand of said partnership, and proceeded to collect in said accounts. Thereafter, at what exact time does not appear in the record, said defendant paid in full the claims of thirty-five of the creditors, aggregating $955.66, and from time to time made payments upon the claims of sixteen creditors, including themselves, as the funds were collected in. It appears that the last payment made to plaintiff, St. Helens Quarry Co., was made on February 28, 1914, and that the last

payment made to the Hawthorne Dock Co. was made on August 27, 1913. Plaintiff commenced suit upon the contract on July 1, 1916, alleging that on plaintiff's claim there was due and remaining unpaid the sum of $2,003.08, and on the claim of the Hawthorne Dock Co. assigned to plaintiff, the sum of $247.67.

The defendant answering set up that the contract herein set forth was an assignment for the benefit of creditors and not a bill of sale, and that defendant had taken possession of said property as trustee for the benefit of said creditors, and had administered the same with due care; had paid the small creditors in full, the larger creditors *pro rata,* and had accounted for all of the moneys received from the assets of Vom Cleff & Lundy. The lower court construed the contract to be an absolute promise on the part of the defendant to pay the debts of Vom Cleff & Lundy up to $12,764.47, and submitted to the jury the question as to whether the plaintiff St. Helens Quarry Co. or the Hawthorne Dock Co. had understood the contract between Vom Cleff & Lundy and the defendant to be an assignment for the benefit of creditors, instructing the jury in effect that if said plaintiff or the Hawthorne Dock Co. had construed said contract to be a transfer of the property to defendant to be disposed of and distributed *pro rata* among the creditors, and had adopted that construction of it and acted under it knowing the contract and knowing its terms, that plaintiff and its assignor, Hawthorne Dock Co., or either of them, would not now be allowed to place a different construction upon said contract.

It appears that Vom Cleff & Lundy entered into an arrangement with the plaintiff in 1912, whereby plaintiff placed certain machinery on the dock at the foot of Linn Avenue, and erected a derrick on said dock.

Under arrangements with the partnership business the use of the machinery and appliances owned by the plaintiff would be offset by the use of the dock, and the expenses of the operation of said dock and the transportation of building material across the same and delivery of said material, would be shared equally by plaintiff and the partnership, and the profits thereof were divided equally. Under this arrangement the partnership became indebted to plaintiff for the operation of said dock in the sum of $899.99, which claim is included in the total recovery sought. Defendant contended on the trial below that this indebtedness did not come within the scope of the contract entered into between the partnership and defendant, in that it was not a debt incurred by the partnership by reason of dealings of said partnership while engaged in supplying building materials. The court refused to give the following instruction submitted by defendant:

"You must further find before plaintiff can recover that the claim of plaintiff and the Hawthorne Dock Company arose out of dealings with Vom Cleff & Lundy, as a partnership engaged in supplying building materials. This means that the amount claimed to be due must be for building materials sold to Vom Cleff & Lundy as a partnership. Indebtedness that arose in any other manner cannot be included. You must therefore disregard the item of $899.99 included in plaintiff's claim, being money claimed to have been advanced to Vom Cleff & Lundy in the operation of the dock on Linn Avenue."

The jury brought in a verdict in favor of the plaintiff on the first cause of action for $1,906.06, and on the second cause of action for $231.53, and defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. William D. Fenton, Mr. Harry L. Raffety, Mr. John G. Veatch* and *Mr. David C. Pickett,* with oral arguments by *Mr. Fenton and Mr. Raffety.*

For respondent there was a brief over the names of *Mr. George W. Gearhart* and *Mr. Donald M. Graham,* with an oral argument by *Mr. Gearhart.*

OLSON, J.—Several assignments of error were made in the bill of exceptions, but these appear to be waived by the defendant in its brief, excepting as to two points:

First. Is the agreement upon which plaintiff's right of action is based a bill of sale giving plaintiff a right of action on the promise, or an assignment for the benefit of creditors?

Second. Is defendant liable for the amount due from Vom Cleff & Lundy on account of the operation of the Sellwood dock?

The contract entered into between the partnership and defendant is contradictory as to its terms. The first four paragraphs of said contract constitute a complete bill of sale of all the assets of the partnership to the defendant, with an obligation definite and certain on its part to pay for the same by paying the debts of said partnership arising out of the partnership business up to the amount of $12,764.47. The assignment is absolute in form and the promise is definite as to payment. The fifth paragraph of said contract, however, provides in effect that if the collections from the accounts receivable exceed the total sum of the indebtedness, the overplus thereof shall be paid to the partnership. This paragraph constitutes one of the badges of an assignment for the benefit of creditors in that the reversionary interest in the proceeds is

retained by the assignor thereof. The next paragraph of the contract sets forth in effect that said partnership, and the members thereof individually, shall be liable for any deficit occurring by reason of bills and claims outstanding in favor of the partnership not being sufficient to pay the debts. This paragraph is a badge of a bill of sale in that it is a guaranty of the consideration of the transfer. It is necessary therefore to determine what was the real intent of the parties when this contract was made.

The answers of the defendant clearly set forth that at the time of making this contract the accounts receivable of Vom Cleff & Lundy, together with the cash on hand, all of which were by this contract transferred to defendant, exceeded in amount the sum of $12,764.47, named in such contract as the limitation of the debts contracted to be paid by defendant. This does not take into consideration the transfer of the lease of the warehouse assumed by defendant, nor the business and goodwill of the partnership, nor some other personal property of the partnership not yet disposed of. The partnership was engaged in the same general line of business as the defendant, and the business and the goodwill of said partnership, or at least the removal of a competitor had some value. The acts of the defendant in carrying out this contract are the most significant. Nowhere in the contract is there any provision indicating that the creditors are to be divided into two classes, one of them preferred creditors and the other class to share *pro rata* what is left; yet it appears from the answers of defendant that thirty-five creditors, whose bills aggregate $955.66, were paid in full and that the remaining creditors had received sundry payments on their claims, but from the pleadings it does not appear that any regular sys-

tem was adopted in the paying of *pro rata* dividends upon the claims of those creditors who were not paid in full. An inspection of the record shows that upon the claim of the St. Helens Quarry Co., amounting, as claimed by said company, to $3,312.99, or, as admitted by the defendant, $2,356.30, payments were made after the entering into of this contract as follows: November 30, 1912, $36.05; December 26, 1912, $1,000; April 23, 1913, $250; August 30, 1913, $100; and on February 28, 1914, $20.71. That on the claim of the Hawthorne Dock Co. assigned to plaintiff, amounting to $479.79 as claimed by said company, or $460.69 as claimed by defendant, the following payments were made: October 30, 1912, $138.21; November 30, 1912, $6.25; December 11, 1912, $46.07; March 30, 1913, $34.70, and August 27, 1913, $23.03.

It is apparent from an examination of these payments, as compared with the amount of the debts upon which they are paid, that no system was adopted in regard to the making of said payments, especially as to a uniform date of payment or a uniform rate of payment, excepting the last payment made upon said account. It would seem, therefore, that at the time of making said contract defendant understood it to be an absolute promise upon its part to purchase the assets of the partnership and to pay the debts of said partnership up to $12,764.47; that in pursuance of said intention of the defendant it paid the small creditors in full and made such other payments upon the larger creditors as convenient, until it became apparent that a substantial portion of the accounts receivable of said partnership would probably become worthless.

1, 2. There is no evidence in this case upon the record submitted here showing that the defendant notified

the other creditors that it had taken an assignment of the assets of said partnership for the benefit of all the creditors; nor does it appear that they were consulted at any time about the paying in full of the smaller creditors nor about the disposition of the assets. It is very significant that defendant in selecting the thirty-five creditors to be paid in full did not select the thirty-five smallest for the claim of one of the creditors so paid in full was larger than the claim of any of four creditors upon whose claim a *pro rata* distribution is sought to be made. To hold that this contract was an assignment for the benefit of creditors would be to disregard the positive provisions of three sections of the contract, because one section of said contract is inconsistent therewith. A sale is not invalid because the exact amount of the consideration is not contained in the bill of sale. A stock of goods can be purchased to be paid as per the inventory thereof. It does not invalidate the sale of the assets of the business that the consideration thereof shall be the paying of all the debts of the business, and the fact that a limit is placed upon such amount can make no difference.

It is admitted by both the plaintiff and defendant in their briefs that an action lies in this state by a third person on a contract made for his benefit, therefore, it is not necessary to consider this further or cite authorities in support thereof. This contract is clearly made for the benefit of plaintiff and all other creditors of the partnership, and the consideration is ample to support it in an action at law: *Feldman* v. *McGuire,* 34 Or. 309 (55 Pac. 872).

The plaintiff contends strenuously that this case is governed by *Stout* v. *Watson,* 19 Or. 255 (24 Pac. 230), in which a debtor transferred certain property to a

creditor in consideration of a sum due such creditor, and in further consideration of such creditor paying in full certain labor claims and applying any amount left over on the sale of the property transferred upon the claim of another creditor. The property transferred was attached by still another creditor and sold on sheriff's sale and suit was brought by the transferee under the contract for the recovery of the value of the property from the sheriff. The court held this contract to be an assignment for the benefit of creditors and not a bill of sale, but it is apparent that this case presents a different situation. In the case at bar there was a positive personal obligation to pay debts up to a certain definite amount, which the verdict of the jury has found to be the entire amount of the debts of the assignor. In the *Stout* v. *Watson* case, 19 Or. 255 (24 Pac. 230), there was no attempt to enforce the contract as between the parties thereto. The action brought was not against the assignor but against third parties, whose rights accrued entirely outside the contract, nor do we have—as in this case—a course of action upon the part of the vendee which is inconsistent with the idea that the contract was intended as an assignment for the benefit of creditors.

As to the second point raised by defendant the only evidence before us is to the effect that the arrangement between the St. Helens Quarry Co. and Vom Cleff & Lundy in regard to the use of the dock at the foot of Linn Avenue, shows that the arrangement was for the use of said dock for the handling of building materials. The partnership had the lease upon said dock and was necessarily obligated for the expense and rental thereof. The plaintiff put in the use of certain machinery and appliances and building materials were handled over said dock, the expenses and profits to be

shared equally by the plaintiff and defendant. There is no dispute as to the facts. The instruction requested by defendant was peremptory in requiring the jury to eliminate this claim of $899.99 from consideration in this case. If the instruction had submitted to the jury the question as to whether or not the operation of the Linn Avenue dock was within the scope of the partnership dealings in building materials there might be some question, but the instruction as submitted was properly refused. AFFIRMED.

McBRIDE, C. J., and BEAN and BURNETT, JJ., concur.

Submitted on briefs at Pendleton October 28, affirmed December 10, 1918.

TEMPLE *v.* HARRINGTON.*

(176 Pac. 430.)

Contracts—Construction—Separate Instrument.

1. Where two instruments are executed at the same time between the same parties, covering the same subject matter, they will be construed together as constituting one agreement.

Dower—Purchase-money Mortgages—Statutes.

2. Where a husband purchased land, at which time he received a deed and executed a mortgage in an amount equal to the unpaid portion of the purchase price, the two will be construed together, and the mortgage will be construed to be a purchase-money mortgage, under Section 7289, L. O. L., and wife will not be entitled to dower as against mortgagee.

Mortgages—Construction.

3. A note and a mortgage given to secure it will be construed together as one instrument.

Husband and Wife—Attorney in Fact.

4. Where a husband signs a mortgage personally, the signing of his name again after the name of his wife would have the legal

*For authorities discussing the question as to dower rights in purchase-money mortgage, see note in 40 **L. R. A. (N. S.)** 274.
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effect of being the signature of the wife by the husband, as her attorney in fact, especially where the note is so signed.

Alteration of Instruments—Immaterial Alterations.

5. An alteration which does not change the legal effect of an instrument is not a material alteration and does not invalidate the same.

Alteration of Instruments—Alterations Prior to Signature.

6. Any change made in an instrument before signatures are affixed is not an alteration, it being presumed that such changes are authorized.

Alteration of Instruments—Immaterial Alterations.

7. The expression in a note, "8 per cent per annum from annum until paid," is of the same legal effect as if read, "8 per cent per annum from —— until paid," and hence changing the word "annum" to the word "date" was not a material alteration, under Section 5850, L. O. L.

[As to material alteration of note as affecting mortgage security, see note in Ann. Cas. 1913E, 317.]

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This is a suit to foreclose a real estate mortgage. On January 25, 1913, defendant Kate Willcox Harrington executed a power of attorney to her husband, defendant George H. Harrington, containing the following grant of power:

" * * For me and in my name and for my use and benefit to demand, sue for, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by attachment, arrest or otherwise, and to compromise and agree for the same, and discharge for the same for me, and in my name. To make and deliver, contract for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin, and possession of all lands and all debts and other assurances in the law therefor, and to lease, let, sell, release, convey, mortgage and hypothecate lands, tenements and hereditaments upon such

terms and conditions and under such covenants, as he may think fit, and to bargain for, buy and sell, mortgage, hypothecate, and in any and every way and manner, deal in and with goods, merchandise, choses in action, and other property in possession or in action, and to do every kind of business of what nature or kind soever, and also for me and in my name and as my act and deed to sign, seal, execute, deliver, and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and such other instruments in writing of whatsoever kind and nature that may be necessary.

"Giving unto my said attorney full power to perform every act and thing which he may think necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney shall lawfully do, or cause to be done, by virtue of these presents."

On the 27th day of January, 1913, at North Yakima, Wash., defendant George H. Harrington received a deed from John Powel to Lots 14, 15, 16 and 17, Block 116, in Chaplin's Addition to the town of La Grande, Union County, Oregon, and simultaneously therewith executed a note and mortgage for eight thousand ($8,000) dollars to John Powel covering the same property. In signing the note defendant George H. Harrington signed his own name and the name of Kate Willcox Harrington by "George H. Harrington, her attorney in fact." In signing the mortgage George H. Harrington signed his name, and the name of Kate Willcox Harrington was affixed thereto presumably by the notary, as an inspection of the mortgage would indicate that it was written in the same handwriting, and underneath her name the name of George H. Har-

rington was written. In this form the mortgage was recorded on February 7, 1913, at La Grande, Oregon. Sometime thereafter, by whom or at what date does not appear from the evidence, the words "by here Atty. in Fact" were added underneath the name of George H. Harrington on the mortgage itself. The note is in the usual form, and in the blank space where the time should be inserted to start the running of the interest, the word "annum" is written so it reads "at the rate of 8 per cent per annum until paid." The space in the mortgage, where the word should be written to fix the time from which interest should run, shows an erasure and the word "date" typewritten therein. Several interest payments were made on this note, at least two of them being made by defendant Kate Willcox Harrington. The premises covered by the mortgage were leased by defendants George H. Harrington and Kate Willcox Harrington to defendant W. G. Sawyer. The mortgage in question was assigned by John Powel to J. F. Temple who, upon default in the payment of the interest and insurance on the buildings, brought suit for foreclosure.

Defendant W. G. Sawyer, tenant in possession, made no appearance, and defendants George H. Harrington and Kate Willcox Harrington answered separately. The latter set up that the power of attorney given by her to her husband two days before the execution of the mortgage was not sufficient to bar her dower interest in said property, nor to bind her on the note accompanying the mortgage. George H. Harrington set up that said mortgage had been altered and thereby rendered invalid, and that the providing for 12 per cent per annum interest on certain delinquencies in interest and insurance made said note and mortgage usurious. The lower court found against these conten-

tions and entered a decree against both of said defendants for the amount of the note, interest and insurance paid by plaintiff, and ordered a foreclosure of the mortgage. Defendants George H. Harrington and Kate Willcox Harrington appeal. After said appeal was taken J. F. Temple died and by order of this court Isaiah Ulysses Temple and Ernest Monroe Temple, executors of the estate of J. F. Temple, were substituted as plaintiffs. AFFIRMED.

For appellants there was a brief submitted over the name of *Mr. D. W. Bailey.*

For respondents there was a brief prepared and submitted by *Mr. John S. Hodgin* and *Mr. James B. Perry.*

OLSON, J.—The only points raised by appellants in their brief are, first, that the power of attorney executed by Kate Willcox Harrington to her husband, George H. Harrington, is not sufficient to authorize said George H. Harrington either to sign a note for said Kate Willcox Harrington, or to bar a dower interest by signing a mortgage for her. Second, that the alterations made in the mortgage invalidated the same. Third, that if the power of attorney does not authorize George H. Harrington to sign the note as and for Kate Willcox Harrington, the note being joint and invalid as to one party would be invalid as to both.

An examination of the power of attorney seems to indicate that it is a general power of attorney and contains therein a specific authorization to "and also for me and in my name and as my act and deed to sign, seal, execute and deliver, * * notes, evidences of debt * * ." The signature affixed to the note is in due and proper form, and the power of attorney seems to give ample authority for the execution of the note.

1, 2. As to whether said power of attorney is sufficient, however, to bar the dower right of Kate Willcox Harrington is a question unnecessary to a decision of this case. It appears on January 27, 1913, John Powel deeded the property in question to George H. Harrington, and immediately thereafter a mortgage was executed to John Powel covering the same property. Where two instruments are executed at the same time between the same parties and covering the same subject matter, they will be construed together as constituting one agreement: *Dean* v. *Lawham,* 7 Or. 422; *Kruse* v. *Prindle,* 8 Or. 158; *Bradtfeldt* v. *Cooke,* 27 Or. 194, 203 (40 Pac. 1, 50 Am. St. Rep. 701). Considering the deed and mortgage together as one instrument it is apparent that said mortgage is a purchase money mortgage. This is further borne out by the fact that the mortgage itself does not recite that any money was paid by the mortgagee to the mortgagors as a consideration therefor, as is the custom in a straight loan, but recites that "mortgagors herein do hereby mortgage to John Powel, mortgagee herein, to secure the payment of Eight Thousand ($8,000) Dollars, etc." This being a purchase-money mortgage, it is covered by Section 7289, L. O. L., which provides:

"When a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands as against the mortgagee or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to dower as against all other persons."

Kate Willcox Harrington, therefore, not being entitled to dower as against this mortgagee and those claiming under him, it is immaterial whether the power of attorney is broad enough to authorize the barring

of her dower, and the decree was properly entered in the lower court barring her dower as far as the interests of the assignee of the Powel mortgage were concerned.

3–5. The question remaining to be settled is that of the alleged alterations in the mortgage. The addition of the words "by here Atty. in Fact" under the name of George H. Harrington signed after the name of Kate Willcox Harrington is not a material alteration, and therefore will not invalidate the mortgage. In the first place, under the decisions of this court the note and mortgage are construed together as one instrument and the execution of the note by George H. Harrington as the attorney in fact of Kate Willcox Harrington is entirely regular. The placing of the signature of George H. Harrington after that of Kate Willcox Harrington upon an instrument which said George H. Harrington had signed personally, would have the legal effect of being the signature of Kate Willcox Harrington by George H. Harrington, her attorney in fact, especially in view of the fact that the note accompanying said mortgage is properly executed and sufficiently indicates the intent of the parties. An alteration that does not change the legal effect is not a material alteration and does not invalidate the instrument.

6, 7. The other alteration, the putting of the word "date" over some other word erased, presumably the word "annum" as shown upon the note, is not a change that would invalidate the instrument. An examination of the original mortgage discloses the fact that the word "date" is written by the same typewriter as was used to fill in the other blanks in the mortgage, in that certain peculiarities of the blurring of certain letters are reproduced in the word "date." Any change made in an instrument before the signatures are affixed is

not an alteration within the meaning of the decisions as to the invalidation of instruments by material alterations. Any changes made before the signing of the instrument are presumed to be authorized. The evidence in this case does not definitely fix this change as having been made after the execution of the instrument, and from the testimony there would be little or no opportunity after the execution of the instrument for any change to be made on the same typewriter as was used to fill out the original instrument. However, this change is not material. The expression "8 per cent per annum from annum until paid" is of the same legal effect as if it read "8 per cent per annum from —— until paid." Section 5850, L. O. L., provides:

" * * Where the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof. * * "

The effect, therefore, of this change is simply to carry out the provisions of the section above set forth, and not being a material change it will not invalidate the instrument. That this construction of the instrument was the intent of the parties is shown by the fact that interest was paid by the defendants several times, the interest being computed on the basis of the interest being payable from date of note and mortgage.

Decree affirmed. AFFIRMED.

Argued to Department No. 2, April 18, reversed and remanded May 28, rehearing allowed. Rearranged and submitted *in banc* July 16, reversed in part and affirmed in part October 22, further rehearing denied December 10, 1918.

MALLOY *v.* MARSHALL-WELLS HARDWARE CO.*

(173 Pac. 267; 175 Pac. 659; 176 Pac. 589.)

Appeal and Error — Record — Sufficiency — Removal of Cause—Evidence.

1. The contention that the state court lost its jurisdiction on defendant's filing petition and bond for removal to the federal court, even if otherwise well taken, cannot be sustained, where the bill of exceptions shows no evidence of such filing, although the petition and bond alleged to have been filed were attached to answer as exhibits.

[As to appealability of order transferring cause from state to federal court, see note in **Ann. Cas. 1916D, 1049.**]

Removal of Causes—Diverse Citizenship—Time of Filing Petition.

2. Under Act Cong. Aug. 13, 1888, Chapter 866 (25 Stat. 435), providing that petition for removal of causes to federal court, based on diversity of citizenship, must be filed before the defendant is required by law or rule of the state court to answer, the time of filing petition expires on such date, notwithstanding the time to answer may have been extended by stipulation or court order.

Master and Servant — Injuries to Servant — Negligence—Safety Devices—Evidence.

3. In an action by a servant for personal injuries alleged to have been caused by the dangerous condition of the master's hatchway, evidence that a similar hatchway was provided with a cleat, *held* admissible to show that it was practicable to use such safety devices.

Master and Servant — Injuries to Servant — Machinery—Safety Devices—Evidence.

4. In an action by a servant for injuries sustained, alleged due to master's failure to safeguard a hatchway, evidence that after plaintiff's injury the master placed a railing around the hatchway was admissible to show that such a railing was practicable.

Appeal and Error—Review—Bill of Exceptions—Sufficiency.

5. A bill of exceptions setting out the instructions, with exceptions thereto, refused instructions, with exceptions allowed thereto, with exhibits not physically attached to the bill, but certified in trial judge's certificate to contain a complete transcript of the evidence, is sufficient for consideration of rulings on motions for nonsuit and directed verdict.

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*On the question as to master's duty to guard machinery as a delegable one, see notes in 54 **L. R. A.** 71; 17 **L. R. A. (N. S.)** 568. REPORTER.

Master and Servant—Negligence — Dangerous Premises — Control of Leased Property—Evidence.

6. Evidence *held* ample to entitle the jury to infer from tenant's enlargement of a hatchway and continued use thereof that it had such control thereof that it could inclose and otherwise safeguard the hatchway.

Master and Servant—Injury to Servant—"Machinery."

7. A block and tackle used for hoisting things through a hatchway constitutes "machinery," within the meaning of the Employers' Liability Act (Laws 1911, p. 16).

Master and Servant—Dangerous Machinery—Duty—Use.

8. Although the master is a merchant leasing and using a barn, in so far as it operates machinery therein it comes within Laws of 1911, page 16, requiring floor openings and similar dangerous places to be inclosed, notwithstanding they may be used only 10 or 12 times a year.

Master and Servant — Injuries to Servant — Dangerous Premises — Hatchway.

9. Evidence *held* to justify the jury in finding that it was practicable for the master to have installed a guard-railing around a hatchway in its barn; failure to do which caused injury to plaintiff.

Master and Servant—Injuries—Care—Delegation of Duty.

10. The master's duty under Laws of 1911, page 16, to construct a guard-rail around a hatchway to protect its servants is absolute and nondelegable, and would remain obligatory on the master, even if it had ordered its servant, plaintiff, to construct the guard-rail.

Master and Servant—Injuries to Servant—Scope of Employment—Servant Working for Himself.

11. A servant employed to work in and living in his master's barn, and injured while hoisting wood therein for his own use, was not a trespasser, and was justified in using facilities at hand; and where his injury was chargeable in part to the master's violation of law in leaving a hatchway without a safeguard, the master is liable.

Master and Servant — Injuries to Servant — Actions — Liability of Foreman.

12. Where a servant was injured on the master's premises while working for himself, and not under the direction of the master's foreman, the foreman would not be liable, under Laws of 1911, page 17, section 3, for failure to install safety devices as required.

Master and Servant—Injuries to Servant—Actions—Manner of Doing Work.

13. Those provisions of the Employers' Liability Act, defining the manner of doing certain work, are inapplicable to the case of a servant injured through the breaking of his master's rope while engaged in working for himself, and the master's foreman was not required to test the rope selected by plaintiff.

Statutes—Construction—Legislative Intent.

14. In the construction of a statute, the paramount duty of the court is to give effect to the legislative intent; and where a statute

is re-enacted with an additional clause or proviso, the clause must not be presumed meaningless.

Exceptions, Bill of—Form—Constitution—Statute—Construction.

15. Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), provides that upon appeal either party may have attached to the bill of exceptions the whole testimony, instructions, and other material matter, and Laws of 1913, page 651, re-enacts Section 171, L. O. L., with the further proviso that the bill of exceptions may consist of a transcript of the whole testimony and proceedings of the trial, the instructions and any other matter material to the decision on appeal, etc., a bill of exceptions conforming to the proviso requires review of instructions.

Trial—Instructions—Assuming on Trial—Evidence—Instructions.

16. Instructions that assume facts not supported by the evidence are erroneous.

Master and Servant—Injuries to Servant—Instructions—Inspection of Machinery.

17. An instruction that the Employers' Liability Act applied to the manner of doing work, where the injured servant was working for himself with the master's machinery, and that master's foreman, who was not directing the work, was liable for failure to test a rope, was erroneous.

Master and Servant—Injuries to Servant—Instructions—Diligence of Master.

18. Instruction on the common-law liability of a master for injuries to a servant, caused from the unsafe condition of a hatchway, *held* erroneous, as exacting too high a degree of diligence.

Trial—Instructions—Contradiction.

19. Contradictory instructions are erroneous.

Master and Servant—Injuries to Servant — Actions — Instructions—Contributory Negligence—Pleading.

20. Allegations of master's answer that whatever injuries the servant suffered were the result of his own acts, and that any negligence involved was that of the servant, were sufficient to justify the court in instructing on contributory negligence.

ON REHEARING.

Judgment—Estoppel by Judgment—Involuntary Nonsuit.

21. Where servant sued the master for injuries, involuntary nonsuit did not, in view of Section 184, L. O. L., bar subsequent action against both the master and the foreman.

Appeal and Error—Scope—Conflicting Evidence.

22. In servant's action for injuries, the court on appeal cannot disturb the jury's finding that plaintiff was an employee where there was some evidence of that relation.

Master and Servant—Injuries to Servant—Course of Employment—Questions for Jury.

23. Where servant set up master's contract to supply fuel wood, and alleged injuries while hoisting wood to his own quarters, whether

the foreman's ordering other servants to haul wood to plaintiff's place of work constituted a recognition of such alleged agreement, and whether the wood belonged to plaintiff and not to the master, *held* for the jury.

Master and Servant — Employers' Liability Act—Construction—Liability of Foreman.

24. The Employers' Liability Act extends liability to foremen, in view of Section 3 thereof, making the foreman criminally liable for neglect of duty.

Statutes—Construction—Title.

25. The title may be looked to for the purpose of ascertaining the meaning of the act.

Statutes—Enactment—Initiative.

26. An act adopted by the initiative must comply with Article IV, Section 20, of the Constitution, as to subjects and titles of acts.

Master and Servant—Injuries to Servant—Actions—Defenses Available to Foreman.

27. Under the Employers' Liability Act, though the foreman may be criminally liable for neglect of duty, the defense of contributory negligence is open to him in a civil action notwithstanding it is withdrawn from the employer.

Master and Servant—Employers' Lability Act—Criminal and Civil Liability of Foreman.

28. The Employers' Liability Act, Section 3, making the foreman criminally liable for neglect of duty, and providing that such punishment shall not affect his civil liability, neither enlarges nor lessens the foreman's civil liability.

ON PETITION FOR FURTHER REHEARING.

Appeal and Error—Supplemental Record—Finding After Decision.

29. The court will not order a record to be supplemented to present omitted matters concerning an affirmative defense, shown in the petition for rehearing, where the questions arising thereunder have been twice decided adversely to defendant appellant.

Removal of Causes—Denial of Second Motion After Remand.

30. Where a cause was removed to federal court upon first petition therefor, asserting diversity of citizenship, and was remanded to the state court, the state court correctly denied a second petition, which was simply an enlarged edition of the first in deference to the order of the federal court.

From Multnomah: HARRY H. BELT, Judge.

Department 2.

This is an action to recover damages for a personal injury sustained by plaintiff September 11, 1915. It

appears that Marshall-Wells Hardware Company is operating a two-story barn at the corner of Seventeenth and Lovejoy Streets, in the City of Portland. Plaintiff had been in the employ of this corporation since April, 1910. For upwards of four years prior to his injury he had lived with his family in the barn above referred to. His duties were manifold; they included the care of the horses, the cleaning of the barn, looking after the harness and the vehicles and selling gasoline. Plaintiff had no hours of work, but was on duty practically all the time. He was liable to be awakened at night and called on to look out for a sick horse. Plaintiff reported to the defendant Camp, who was superintendent of the Portland business of his co-defendant. Plaintiff was not a foreman and no employee of the corporation looked to him for instructions.

The accident occurred about 5 o'clock on Saturday afternoon. Plaintiff was engaged in hoisting wood from the first floor of the barn to the second story through a hatch or opening in the second floor six feet by four. The defendant had constructed a track for a hay-carrier ten feet above the second floor of the barn and at the time of the accident a pulley was fastened to this track. One end of the rope passing around this pulley ran to another pulley which was anchored by a short rope to a piece of lumber nailed across one of the stalls. A horse was hitched to the end of the rope passing through this second pulley. The other end of the rope was tied to a sling passing around a box of wood. The horse was driven by William Malloy, one of plaintiff's sons. Plaintiff and J. W. Miller were at the hatchway on the second floor to receive the wood as it was elevated. As the box of wood reached the second floor it caught. Plaintiff and Miller reached out

with poles to guide the box through the hatch. At this time the anchor rope attached to the pulley on the ground floor broke and plaintiff fell through the hatch, sustaining serious injuries.

There is evidence that to the east of the hatch the second floor was slippery because hay had been repeatedly pulled across it. Negligence is predicated on this circumstance; also on the fact that the hatch was too small to admit of the easy passage through it of hay and other things which were hoisted to the second floor. The action is based in part also on the admitted fact that the hatch was unguarded by a railing of any kind. It appears that when not in use the hatch was closed by two hinged doors and that when the hatch was open these doors rested on the floor. Plaintiff also charges negligence in the failure of defendants to test the rope which broke.

The defendants deny all allegations of negligence and allege that plaintiff's injuries are due wholly to his own acts while working for himself in matters apart from the work for which he was employed by the defendant corporation.

Judgment was entered on a verdict for plaintiff against both defendants and the defendants appeal.

REVERSED WITH DIRECTIONS.

For appellants there was a brief over the names of *Messrs. Emmons & Webster* and *Messrs. Stapleton, Conley & Stapleton,* with oral arguments by *Mr. Lionel R. Webster* and *Mr. J. L. Conley.*

For respondent there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett, Messrs. Bauer & Greene, Mr. A. H. McCurtain* and *Mr. J. W. Kaste,* with oral arguments by *Mr. S. C. Spencer* and *Mr. Kaste.*

McCAMANT, J.—1. A preliminary question is suggested by the contention of Marshall-Wells Hardware Company that the state court lost jurisdiction on the filing of its petition and bond on removal to the federal court. It is alleged in the first affirmative answer of this defendant that such petition and bond were filed in the Circuit Court February 16, 1917, and that the Circuit Court refused to make an order removing the cause.

The petition and bond alleged to have been filed are attached to the answer as exhibits. The reply admits:

"That after the time allowed by law for the removal of this cause to the District Court of the United States for the District of Oregon, said defendant attempted to remove the same but was unsuccessful."

The other allegations of the answer are denied. The bill of exceptions fails to show any evidence on this subject. Nothing further is shown in this connection by any part of the record. It does not appear, therefore, that the petition and bond were filed in the Circuit Court. This condition of the record prevents us from sustaining this contention of Marshall-Wells Hardware Company even if it were otherwise well taken.

2. The petition attached to the answer as an exhibit is sworn to under date of February 14, 1917, and could not have been filed earlier than that date. It alleges that the petitioning defendant was duly served within Multnomah County, December 14, 1916. When, as in this case, the right of removal is based on diversity of citizenship, the petitioner is required to file his petition "at the time, or any time before the defendant is required by the laws of the state or the rule of the

state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff'': 25 Stat. 435. Under our law the petitioning defendant was required to answer or plead to the complaint by December 24, 1916, and although his time so to plead may have been enlarged by stipulation or court order, his time to petition for removal expired on that day. There is a line of authority to the effect that a plaintiff who stipulates for an extension of time within which to answer will not be heard to contend that the time allowed for the removal of the cause has expired. If this principle can be considered settled, it by no means follows that the Circuit Court lost jurisdiction of this cause by the filing of a petition and bond on removal February 14, 1917. The Circuit Court did not err in retaining jurisdiction of the cause.

3. Frank A. Doney, a witness for plaintiff, testified that the floor at the side of the hatch was slippery and that its dangerous condition could have been obviated if a cleat had been put around the edge thereof. He was then asked, ''Have you ever seen barns where they have this cleat that way?'' Over the objection and exception of defendants he testified that he was familiar with a barn at Folsom, Montana, where such a cleat was in use about a floor opening. This evidence was offered to show that it was practicable to use the devices whose absence was contended by plaintiff to constitute negligence. In our opinion it was pertinent to the issue.

4. The witnesses Philip Erickson and William Malloy were permitted to testify over defendants' objection and exception that after plaintiff's injury a railing was put around the hatchway. The court stated that this testimony had no tendency to establish negligence, but that it was admitted solely for the purpose of show-

ing that such a railing was practicable. That the testimony when so limited was properly admitted is taught by *Love* v. *Chambers Lumber Co.*, 64 Or. 129, 134, 135 (129 Pac. 492).

5. Plaintiff contends that the bill of exceptions does not permit us to notice the other assignments of error which are pressed upon our attention. The bill of exceptions recites the trial of the cause before a jury, the taking of plaintiff's testimony which is attached as Exhibit "A," the separate motions for nonsuit which were denied and the taking of defendants' testimony which is attached as Exhibit "B." The only portion of the testimony which is segregated is that which illustrates the foregoing rulings on the admissibility of evidence. The bill of exceptions sets out *seriatim* the instructions of the court, the exceptions reserved thereto and the requested instructions which were not given, defendants being allowed exceptions to the refusal thereof. The exhibits which are sent up with the transcript are not physically attached to the bill of exceptions. Plaintiff contends in reliance on *Keady* v. *United Railways Co.*, 57 Or. 325, 333, 334 (100 Pac. 658, 108 Pac. 197), that we cannot consider the bill of exceptions even for the purpose of reviewing the rulings on defendants' motions for a nonsuit and for a directed verdict.

In the case cited the exhibits consisted of considerable documentary evidence and the nature of the controversy was such that these documents might well prove decisive. The documents were neither attached to the bill of exceptions nor identified in any way except by a certificate of the county clerk. The certificate of the trial judge was to the effect that the bound volume of testimony together with the exhibits attached constituted all the evidence. There being no

exhibits attached, it appeared affirmatively that a part of the testimony was missing. The court therefore applied the presumption that there was no error and refused to consider the questions based on the bill of exceptions. One of these questions was the alleged error in denying the motion for a nonsuit.

In the case at bar the certificate of the trial judge recites that Exhibits "A" and "B" "contain a full, true, complete and correct transcript of all the evidence." There is no mention of exhibits in the certificate. The exhibits referred to in the transcript of the evidence are few in number and unimportant in their bearing on the question of liability. Two of them are radiographs of plaintiff's spine; their evidentiary value relates wholly to the *quantum* of damages, a matter with which we are not concerned on this appeal. Another exhibit is a certified copy of an order of the federal court and no question is made but that its legal effect was correctly stated to the jury. Other exhibits are plats of the first and second floors of the barn where the accident occurred; they are illustrative of the testimony, but not otherwise material. The only remaining exhibit is a notice which was hanging in the barn and which advised teamsters what to do if they ran over anyone. The purport of all these exhibits is shown by the transcript of testimony which is duly identified. We are not disposed to extend the doctrine of *Keady* v. *United Railways Company* as we would have to do if we were to sustain this contention of plaintiff. It is our duty on this record to review the rulings of the Circuit Court in denying the separate motions for nonsuit and directed verdict interposed by defendants. We will first consider the motion interposed by the defendant corporation.

6. It appears by the testimony that when this defendant took possession of the barn in the autumn of 1910 it rigged up a hay carrier for the purpose of putting hay and other things in the second story of the barn. The hay carrier proved unsatisfactory and after the winter of 1911–1912 it was discarded. Thereafter hoisting was done by block and tackle substantially as at the time of the accident. The heavier articles were hoisted from outside the barn directly into the second story, but ten or twelve times a year the hatch through which plaintiff fell was used for hoisting purposes by employees of the defendant corporation. Sometimes they secured their power from an auto truck and sometimes they used a horse. They always used the pulley hung over the hatch and the other pulley anchored on the first floor. It is admitted that the defendant corporation was a lessee of the barn and there is ample evidence that it exercised control thereover. Prior to the date of plaintiff's injury the defendant corporation enlarged the hatchway. The jury was entitled to infer from this circumstance that this lessee had such control over the property as enabled it to inclose the hatchway and otherwise protect it.

7. We must hold that the block and tackle used for hoisting through the hatch constituted machinery. In *Dunn* v. *Orchard Land Co.*, 68 Or. 97, 102 (136 Pac. 872), Mr. Justice BURNETT adopts from the Encyclopedic Dictionary the following definition of machinery:

"A contrivance by means of which a moving power is made to act upon any body and communicate motion to it."

In *Corning* v. *Burden*, 15 How. (U. S.) 252, 267 (14 L. Ed. 683), Mr. Justice GRIER says:

"The term 'machine' includes every mechanical device or combination of mechanical powers and de-

vices to perform some function and produce a certain effect or result."

Other judicial definitions are collated in 5 Words and Phrases, 4267, and 3 Words and Phrases, Second Series, 204. Under all of the definitions the device and arrangement used for hoisting into the second story of the barn are machinery.

8, 9. The Employers' Liability Law of 1910 is applicable to all "persons whatsoever, engaged in the * * operation of any machinery": Laws 1911, p. 16. While the defendant corporation is primarily a merchant and while the structure in question is a barn, in so far as the defendant operates machinery therein it comes within the purview of the act above referred to and is chargeable with the duties therein defined. One of the duties prescribed by the first section of this act is:

"All shafts, wells, floor openings and similar places of danger shall be inclosed."

It is true that the defendant corporation engaged in the operation of machinery at the hatch only ten or twelve times a year. It is also true that ordinarily the hatch was closed with trap-doors. These circumstances do not relieve this defendant from the duty imposed by the statute. The applicability of the statute is not dependent upon the continuity of the operation of the machinery. The testimony shows that the hatch was opened frequently for the purpose of throwing down hay and packing material. The hatch was unquestionably a floor opening and the statute required it to be inclosed. The evidence showed that the track to which the pulley was attached was ten feet above the floor of the second story of the barn. A guard-rail four or five feet in height could therefore have been constructed about the hatch without destroy-

ing its usefulness for hoisting purposes. The evidence justified the jury in finding that such a rail was practicable and that if it had been installed plaintiff would not have been injured.

10. It is contended that plaintiff himself should have constructed the guard-rail. There is evidence that he could have secured from the defendant corporation the materials required for such construction, but there is no evidence that it was his duty so to do. Under the statute this duty devolved on Marshall-Wells Hardware Company. This duty was absolute and nondelegable. It would still have been obligatory on the corporation even if plaintiff had been ordered to construct the guard-rail and had agreed to do so: *Bowersock* v. *Smith,* 243 U. S. 29 (61 L. Ed. 572, 37 Sup. Ct. 371). As illustrative of the construction given statutes of this class see *Steel and Masonry Contracting Co.* v. *Reilly,* 210 Fed. 437, 439 (127 C. C. A. 169); *Ford Motor Co.* v. *Donaldson,* 218 Fed. 350, 351, 352 (134 C. C. A. 158); *Continental Public Works Co.* v. *Stein,* 232 Fed. 559, 563 (146 C. C. A. 517); *Feldman* v. *Robert E. Mackay Co.,* 174 N. Y. App. Div. 848 (161 N. Y. Supp. 564).

11. For the determination of the question now under consideration it is not decisive that plaintiff was working for himself at the time of his injury. He was not a trespasser, but was where he had a right to be. He was certainly authorized to use the wood and in order that he might use it he had to hoist it. He was justified in using the facilities which were at hand for such purpose. While so engaged in a lawful occupation he was injured and there was evidence that the injury was chargeable in part to the violation by the defendant Marshall-Wells Hardware Company of a plain duty imposed upon it by statute. The Circuit Court

did not err in denying the motions of this defendant for a nonsuit and a directed verdict.

12. A different question was raised by the motions of like purport presented on behalf of the defendant Camp. His liability, if it exists, must be predicated on Section 3 of the Employers' Liability Law, Laws 1911, page 17. This section provides:

"It shall be the duty of owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be."

It will be noted that there is an error in this section as printed in the General Laws of Oregon for 1911. The enrolled act on file with the Secretary of State reads as above.

The defendant Camp was not in charge of the work which plaintiff was doing at the time of his injury. The wood which was being hoisted was part of a large quantity on the ground floor of the barn and which was in the way. Plaintiff testifies that Camp said to him about a week before the accident: "Well, it should be taken out of here, it is in the road." This was not an order to plaintiff to take the wood upstairs and no witness testifies to such an order. We find no evidence that in taking the wood upstairs plaintiff was working for anyone other than himself. It is true that the teamsters had a stove on the ground floor of the barn and that they occasionally went upstairs for wood

when the supply downstairs was exhausted. It is clear nevertheless that the wood was being hoisted for plaintiff's use. It was not being taken upstairs that it might later be brought downstairs. There was evidence from which the jury was entitled to infer that the defendant corporation had agreed to supply plaintiff with some fire-wood, but there was no evidence that said defendant was obligated to deliver the wood on the second floor of the barn.

13. The defendant Camp was under no obligation to test the rope which broke. The rope was one selected by plaintiff himself from a quantity of ropes belonging to the defendant corporation. The work in the course of which plaintiff was injured was not the work of the defendants and those provisions of the Employers' Liability Act defining the manner in which certain work shall be done were inapplicable to this case.

In *Hoag* v. *Washington-Oregon Corporation,* 75 Or. 588, 604 (144 Pac. 574, 147 Pac. 756), liability was predicated on misfeasance rather than nonfeasance and the individual defendants held liable were in actual charge of the work which caused the injury. In *Lawton* v. *Morgan,* 66 Or. 292 (131 Pac. 314, 134 Pac. 1037), and *Tamm* v. *Sauset,* 67 Or. 292, 297 (135 Pac. 868), the responsibility imposed by the Employers' Liability Act is limited to the classes of persons named therein. We think the defendant Camp is not one of the persons so named and that he cannot be held liable under this statute. The record also fails to charge him with a common-law liability. If anyone was liable because of the slippery condition of the floor by the side of the hatch, it was the corporation and not its superintendent.

The motion for a nonsuit presented by this defendant should have been allowed.

14, 15. The remaining assignments of error are based on the instructions given by the Circuit Court and the requests to instruct which were refused. Plaintiff invokes the doctrine of *Eaton* v. *Oregon Ry. & N. Co.*, 22 Or. 497, 503 (30 Pac. 311); *Keady* v. *United Railways Co.*, 57 Or. 325, 332 (100 Pac. 658, 108 Pac. 197); *National Council* v. *McGinn*, 70 Or. 457, 463 (138 Pac. 493); *Oliver* v. *Grande Ronde Grain Co.*, 72 Or. 46, 49, 50 (142 Pac. 541); *Smith* v. *Kinney*, 72 Or. 514, 517 (143 Pac. 901, 1126); *Harrison* v. *Pacific Ry. & Nav. Co.*, 72 Or. 553, 557, 558 (144 Pac. 91); *Cathcart* v. *Oregon-Wash. R. & N. Co.*, 86 Or. 250, 253, 254 (168 Pac. 308). In reliance on these authorities it is argued that none of the questions raised by the exceptions to instructions given and refused can be considered.

When the first two of the above cases were decided, our statute defining the form of bills of exceptions was as follows:

"No particular form of exception shall be required. The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more": Section 171, L. O. L.

In 1913 this statute was amended so as to read:

"No particular form of exceptions shall be required. The objection shall be stated, with as much evidence, or other matter, as is necessary to explain it, but no more; *provided, however,* that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings had at the trial, including the exhibits offered and received or rejected, the instructions of the court to the jury, and any other matter material to the decision of the appeal": Laws 1913, p. 651.

The last five of the cases cited by plaintiff were decided subsequent to the amendment, but they do not discuss it. All of the cases cited by plaintiff announce

the rule that when the bill of exceptions consists merely of a transcript of the proceedings had at the trial, it will be considered only for the purpose of reviewing the rulings of the trial court on motions for nonsuit and directed verdict. It was held in *National Council* v. *McGinn*, 70 Or. 457, 463 (138 Pac. 493), that the form of the bill of exceptions was not involved in the *mandamus* proceeding there litigated and what was there said on the subject was merely advisory of the views of the learned author of the opinion. Notwithstanding what was said as to the form of the bill of exceptions in *Oliver* v. *Grande Ronde Grain Co.*, 72 Or. 46 (142 Pac. 541), the court reviewed the action of the lower court in instructing the jury and considered one instruction in the light of the evidence. In *Smith* v. *Kinney*, 72 Or. 514 (143 Pac. 901, 1126), it was held that the trial court erred in directing a verdict and what was said as to the form of the bill of exceptions was not necessary to the conclusion reached. In *Harrison* v. *Pacific Ry. & Nav. Co.*, 72 Or. 553, 558, 559 (144 Pac. 91), notwithstanding the criticisms passed on the bill of exceptions the court decided the legal questions raised by the appeal in so far as they involved the correctness of the instructions. In *Cathcart* v. *Oregon-Wash. R. & N. Co.*, 86 Or. 250 (168 Pac. 308), defendants' motion for a nonsuit was sustained and what was there said as to the form of the bill of exceptions was not necessary to the conclusion reached.

In *Hoag* v. *Washington-Oregon Corporation*, 75 Or. 588, 602 (144 Pac. 574, 147 Pac. 756), notwithstanding the criticism passed on the form of the bill of exceptions the court reviewed the instructions in the light of the evidence. It was held in that case that the litigation was controlled by the Employers' Liability Law of 1910, a conclusion which could not have been reached

without consideration of the evidence. The bill of exceptions in that case is not to be distinguished from the bill of exceptions in this case.

Notwithstanding some sweeping language found in the opinions cited by plaintiff, this court has repeatedly passed on the accuracy of instructions when the latter have been presented by bills of exceptions in substantially the form of the bill in this case.

A re-examination of the statute as amended in 1913 convinces us that this appellant is entitled to a decision of the questions presented on its exceptions to the instructions given and refused by the trial court. In the construction of a statute the paramount duty of the court is to give effect to the legislative intent: *State* v. *Simon,* 20 Or. 365, 370 (26 Pac. 170); *Duncan* v. *Dryer,* 71 Or. 548, 557 (143 Pac. 644); Endlich on the Interpretation of Statutes, § 295. It is not to be presumed that the legislature did a vain thing when it amended Section 171, L. O. L. An interpretation of the amended statute which leaves the law after the amendment in the same condition as before is presumptively unsound. Yet this is the effect of a construction of the statute which denies the force and effect of a bill of exceptions to a transcript prepared in accordance with its directions.

In 1910 Article VII of the Constitution was amended so as to provide among other things that "upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal": Laws 1911, p. 7. After the adoption of this amendment litigants in many cases took advantage of it and in 1913 the legislature amended the statute defining the form of a bill of exceptions. The amendment re-

enacted the old statute and added the proviso. Effect should be given to each portion of the amended act; none of it should be rejected as surplusage: *Henry* v. *Yamhill County,* 37 Or. 562, 564 (62 Pac. 375).

The old statute re-enacted the general rule applicable to the form of a bill of exceptions; the proviso added by the amendment made an exception to the general rule. It provided "that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings at the trial, including the exhibits offered and received or rejected, the instructions of the court to the jury, and any other matter material to the decision of the appeal." The use by the legislature of the language of the constitutional amendment is significant. Under the Constitution as amended the parties were entitled to attach to the bill of exceptions a transcript of the proceedings had at the trial. The legislature provides that the bill of exceptions may consist of this transcript.

In Endlich on the Interpretation of Statutes, Section 216, it is said:

"Where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

It is contrary to the canons of construction to interpret the old statute re-enacted in such manner as to eliminate the effect of the proviso. A fair and natural interpretation of the language used in the act of 1913 permits the trial court at its option to settle the bill of exceptions in the form required by *Eaton* v. *Oregon Ry. & N. Co.,* 22 Or. 497, 503 (30 Pac. 311), and *Keady* v.

United Railways Co., 57 Or. 325, 332, 333 (100 Pac. 658, 108 Pac. 197), or to certify a bill of exceptions in the form of a transcript of the proceedings at the trial. To give an effect to the bill settled in one form which is denied to it if settled in the other form is to legislate judicially. In *Redsecker* v. *Wade*, 69 Or. 153, 156, 157 (134 Pac. 5, 138 Pac. 485, Ann. Cas. 1916A, 269), it is said:

"The object of the law and the purpose of the bill of exceptions is to provide for this court a succinct and intelligible statement of the errors about which complaint is made on the appeal. In some cases this can be accomplished by a very brief statement. In others it may be necessary to send to this court everything mentioned in the proviso."

The effort of counsel for appellant should be to prepare and present a bill of exceptions which will raise the questions relied on with a minimum of verbiage, but we cannot refuse to consider any bill which conforms to the statutory requirements. We have examined the evidence for the purpose of reviewing the rulings of the trial court on the motions for a nonsuit and a directed verdict. It is easier to pass upon the instructions in the light of this evidence than it is to forget the evidence and pass upon the charge of the court solely in its relation to the pleadings, as was done in *Portland Public Market* v. *Woodworth*, 67 Or. 327, 331 (135 Pac. 529). A refusal to review these instructions would be to affirm a large judgment when the record clearly shows that the defendant which must pay the judgment has not had a fair trial. On an examination of this bill of exceptions it is apparent that the instructions on which the verdict was based are contradictory and unsound, and that the questions determined by the verdict are not the real questions presented by the record.

This bill of exceptions conforms to the proviso in the act of 1913 and it is our duty to pass on the questions which it raises. All bills of exceptions which come before the court in the future in either of the forms prescribed by that act will be regarded as sufficient.

16. The court gave the following instruction:

"The next question which you should determine, aside from the question of negligence, is this: Was plaintiff at the time of his alleged injury working for himself or was he working for the company? If you believe that he was working for himself and was not carrying on the business of the company or promoting its interests, then you must necessarily find for the defendants.

"An employee, in obeying or carrying out the orders of his superior, or one whose orders he is bound to obey, is within the scope of his employment in so doing, and is performing his duties to his employer in carrying out such orders. Now if you find from a preponderance of the evidence in the case that the defendant Camp ordered or directed or told plaintiff to move the wood from where it was placed, that it was in the way; and that plaintiff in obedience to said order or command did attempt to move said wood, then in so doing he was performing duties to his employer, and such work was within the scope of his employment. However, if at the time of the alleged injuries the plaintiff was taking the wood in question up the hoist way for his own use and benefit, and was not acting under the orders of the defendants, then the court says to you as a matter of law, that he cannot recover."

This instruction is without support in the evidence and is for that reason erroneous: *Bailey* v. *Davis,* 19 Or. 217, 222 (23 Pac. 881); *Bowen* v. *Clarke,* 22 Or. 566, 568 (30 Pac. 430, 29 Am. St. Rep. 625). The direction of Camp to take the wood out of the way was not an order to hoist it upstairs, nor was there any evi-

dence that plaintiff was performing the work of Marshall-Wells Hardware Company when he was engaged in such hoisting. Plaintiff testified that the defendant corporation had agreed to furnish him free wood. Under the testimony of both parties he was entitled to take wood from the pile on the ground floor of the barn. When he segregated the wood he desired and placed it in boxes for hoisting, it became his wood and in hoisting it he was working for himself.

For the same reason the court erred in giving the following instruction:

"If you believe from the evidence that the defendant, Marshall-Wells Hardware Company had agreed to furnish the plaintiff wood, either as a part of his compensation for working for it or otherwise, you must then determine from the evidence whether or not such agreement so to furnish such wood required said defendant to deliver such wood upstairs to the plaintiff's living apartments or whether or not such agreement would be fully complied with by the delivery of such wood downstairs in the building in which the plaintiff's living apartments were located. And if you believe from the evidence that the defendant, Marshall-Wells Hardware Company, did agree to furnish the plaintiff wood for use in the apartments where he lived and if the delivery of such wood on the lower floor of the building in which the plaintiff's living apartments were located was a full compliance with such agreement, and if you further believe that the plaintiff received the injury for which this action is brought while engaged in removing such wood from the lower floor of such building to his living apartments above and was not acting pursuant to the orders of the defendants, you must find for the defendants."

There is no evidence that plaintiff's employer agreed to deliver wood to the second story of the barn for his use.

17. The court also gave the following instruction:

"The Employers' Liability Act provides among other things that all owners, corporations, or persons whatsoever engaged in the operation of any machinery shall see that all rope used therein is carefully selected and inspected and tested so as to detect any defects therein, and that all shafts, wells, floor openings and similar places of danger shall be inclosed, and generally that all owners, contractors, or subcontractors and other persons having charge of any or responsible for any work involving a risk or danger to the employees or to the public, shall use every device, care and precaution which it is practical to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances or devices.

"This Employers' Liability Act further provides that the manager, superintendent, foreman or other person in charge or control of the work or a portion or any part thereof shall be held to be the agent of the employer in all suits for damages for death or for injury suffered by an employee.

"I instruct you as a matter of law that these ropes and these pulleys and this apparatus that the plaintiff and his fellow-employees were using at the time plaintiff claims he was injured is and was machinery and such machinery as referred to in said Employers' Liability Act, and that this cause of action is governed by the provisions of said act."

In so far as the above instruction directed the attention of the jury to the statutory duty of Marshall-Wells Hardware Company to inclose the floor opening through which plaintiff fell, the instruction was pertinent to the pleadings and the testimony. But the work which plaintiff was doing was his own work; in the performance of that work he was not an employee of the Marshall-Wells Hardware Company. The Employers' Liability Act was therefore inapplicable to the

manner in which the work was done. The instruction misled the jury as to the duty devolving on the corporate defendant. The rope referred to in the instruction was one which plaintiff himself selected and threw to his son to be used by the latter. There is no evidence that his employer even knew of the work intended to be done. The corporate defendant was under no obligation to test this rope with a view to its sufficiency for hoisting wood to be used by plaintiff for his own purposes. The court erred in refusing the following instruction:

"I instruct you that neither of the defendants was required to test or inspect the rope which was used by the plaintiff as an anchor rope at the time of the accident."

18, 19. The court also erred in giving the following instruction:

"The court further instructs you that the Employers' Liability Act of this state further provides that all owners, contractors, or subcontractors, and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public shall use every device, care and precaution, which it is practical to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of the suitable material or safety appliance and device.

"It is for you to determine from a preponderance of the evidence in this case, and from all the facts and circumstances, whether or not the work in which plaintiff was engaged at the time of his injury, if you find that he was injured, involved a risk or danger to himself, and if you determine from a preponderance of the evidence that said work did involve a risk or danger to plaintiff, then I charge you as a matter of law that it

was the duty of the defendants to have used every care and precaution, and every device which it was practicable to use for the protection of the plaintiff in said work, limited only by the necessity for preserving the efficiency of said hoistway, and the apparatus and appliance and machinery used in said work, and without regard to the additional cost of suitable (material) or safety appliance and device. Hence, if you find from a preponderance of the evidence that said work did involve a risk or danger to plaintiff, and you further find from a preponderance of the evidence that the floor adjacent to said floor opening was slippery and that plaintiff in the performance of his work was obliged to stand upon said slippery floor, next to or close to said floor opening, and that by reason thereof his work involved a risk or danger to his life and limb, then I instruct you that it was the duty of the defendants to have prevented that risk or danger to plaintiff in his work by using every care and precaution and by using or installing every device which it was practicable for it to use or install, limited only by the necessity for preserving the efficiency of said hoistway and the apparatus used therein."

A common-law liability might be predicated against the corporate defendant on the alleged unsafe condition of the floor adjacent to the hatchway, but it was not liable to the high degree of diligence exacted by the instruction, for the reason that the work in hand was not its work.

The last two instructions quoted are in contradiction of the following instruction given by the court:

"If the work in which plaintiff was engaged at the time of the injury for which he brings this action was not being done for the defendants, or either of them, then you must find for the defendants."

It is error to give contradictory instructions: *Morrison* v. *McAtee,* 23 Or. 530, 534 (32 Pac. 400); *Neis* v.

Whitaker, 47 Or. 517, 524 (84 Pac. 699); *Wike* v. *Oregon-Washington R. & N. Co.,* 83 Or. 678, 685 (163 Pac. 825).

20. The court instructed the jury on the subject of contributory negligence and it is contended that this instruction was irrelevant to the issues. It is alleged in the first further and separate answer of the defendant corporation that "whatever accident happened to the plaintiff and whatever injury he suffered was the result of his own acts and of nothing else and if there was any element of negligence involved in the accident or injury, it was not the negligence of this defendant." This allegation was sufficient to justify the instruction complained of: *Tabor* v. *Coin Machine Mfg. Co.,* 85 Or. 194, 198 (166 Pac. 529).

The instructions were faulty in other respects than those above noted, but the error is not likely to be repeated on a retrial and we will not therefore prolong this opinion by noticing the remainder of the charge.

The judgment is reversed and the cause is remanded, with directions to enter a judgment of nonsuit as to the defendant Camp, and for further proceedings not inconsistent herewith as to the defendant Marshall-Wells Hardware Company.

REVERSED WITH DIRECTIONS.

McBRIDE, C. J., and MOORE, J., concur.

MR. JUSTICE BEAN dissents except as to that part of the opinion relating to the bill of exceptions.

Argued on rehearing July 16, reversed in part and affirmed in part October 22, 1918.

ON REHEARING.

(175 Pac. 659.)

In Banc.

The defendants Marshall-Wells Hardware Company and R. A. Camp appealed from a judgment awarded to Thomas Malloy, the plaintiff, for personal injuries. On September 11, 1915, Malloy was standing at the edge of a hatch cut in the second floor of a barn, which was maintained by the company, for the purpose of receiving a box of wood which was being hoisted from the first floor by means of pulleys, a rope and a horse, and as the box reached the second floor and just as Malloy took hold of the box to pull it clear of the opening a sling rope which was used to anchor the snatch block on the first floor broke, causing the box and the plaintiff to fall through the hatch and to the first floor. The appeal was first presented to and decided by a single department of this court: *Malloy* v. *Marshall-Wells Hardware Co.*, 173 Pac. 267. A petition for a rehearing was granted and the appeal was argued and submitted to the court sitting *in banc.*

The Marshall-Wells Hardware Company is a corporation engaged in the wholesale hardware business. The company owns a large warehouse in Portland, and it also maintains a barn at 17th and Lovejoy Streets. J. E. Harvey occupied the position of shipping clerk and as such had charge of the shipping department; and he not only had charge of the teamsters when "outside of the barn," but he also had authority to hire and discharge teamsters. For about ten years R. A. Camp acted as superintendent for the cor-

poration and had "direct charge of the office affairs and general charge of the warehouse, the machine shop and stables." In April or May of 1910, Camp employed Thomas Malloy to work for the company. Malloy began work by helping in the stockroom and after "a month or so" and at the direction of Camp "he was put on as a teamster." In October, 1910, Camp assigned Malloy to the position of barn boss at the company's stables located at 13th and Johnson Streets and referred to in the record as the old barn. After Malloy had been at the old barn about a week, he was directed by Camp to go to the new barn which had just been constructed at 17th and Lovejoy Streets and to take charge of it. The barn at 17th and Lovejoy Streets is a two-story building. Stalls for horses are built along the west or 17th Street side of the first floor and along the east side of this floor are located a dining-room, washroom, oilroom and a room which most of the witnesses called the "auto shed." The dining-room and washroom were maintained for the use of teamsters working for the company. On the second floor and on the Lovejoy Street side of the building are apartments, consisting of two bedrooms, a living-room, kitchen, pantry and a bathroom. The remainder of the second floor or "loft" is used for storing hay and grain for the horses, hay and excelsior used for packing, and other materials. There is a hatch in the second floor. The witnesses described this opening as being about four feet one way and six feet the other way. A plat received in evidence shows the dimensions to be six feet one and one half inches by four feet eight inches. The floor next to the east side of the hatch had become smooth and slippery by reason of the fact that most of the hay hoisted through the hatch had been taken to the east side of the barn,

and the same hay when dropped through the hole to the first floor was first shoved over the east side of the opening. There was a considerable quantity of wood, consisting of scraps and the ends of boards and the like, in or next to the auto shed. The company has a number of boxes on wheels, sometimes called dirt-trucks, which are used in the barn for various purposes. These boxes are three or four feet long, two or three feet wide and about two feet deep. On the day of the accident the plaintiff and W. J. Miller, a teamster in the employ of the company, filled two or three of these boxes with wood and pushed them over to a place underneath the hatch so that they could be hoisted by means of a rope and pulleys through the hatch and onto the second floor. A rope ran through and hung from a pulley fastened to a hay carrier track above the hatch. William Malloy, a son of the plaintiff, nailed a 2x6 board across the end of one of the stalls, looped a sling-rope around this board, fastened a snatch-block to the sling-rope and through the snatch-block ran one end of the rope which hung from the pulley above the hatch and then hitched a horse to that end of the rope. The other end of the rope was fastened to one of the boxes, containing wood, so that it could be hoisted to the second floor. The plaintiff and Miller ascended the stairway to the second floor to receive the box at the edge of the hatch. William Malloy drove the horse. During the process of raising the box, to use the language of the plaintiff, it "came kind of crooked through the hole, one corner of it, the corner of it caught in the joist and just stuck." By means of a stick the plaintiff "got the box loose and it came up over the floor, and I grabbed hold of it to pull it in and give it a jerk to pull it in on the floor. And at the same time the box jerked

me and it went down through the hole and brought me with it." Miller, who was at the hatch at the time of the accident, testified that the floor "was slippery there and he (Malloy) couldn't hold himself with the rope, and he went with it."

The complaint alleges that the defendant Camp as superintendent of the corporation had charge and control of the barn and the work to be done there; and that Camp ordered the plaintiff to remove the wood and that the latter was hurt while attempting to comply with such order. The complaint is framed upon the theory that Malloy was working for the corporation and executing an order of Camp when injured; and that the circumstances bring the plaintiff within the protection of the Employers' Liability Act, and that therefore both the Marshall-Wells Hardware Company as the employer and R. A. Camp, as the alleged foreman or person in charge of the work, are liable in damages for the injuries sustained by the plaintiff. The plaintiff charges that the defendants were negligent because they: (1) failed to maintain a guard-rail around the shaft; (2) failed to provide a system of communication by means of signals; (3) failed to provide a sufficiently strong rope with which to fasten the anchor pulley or snatch-block, and neglected to test the sling-rope which was used; (4) maintained a shaft which was so small that articles could not be hoisted through it freely and without striking against the under side of the second floor, thus involving a risk or danger; (5) and permitted the flooring at the edge of the hatch to become slippery, and hence creating a risk or danger which would be involved in the work of receiving articles hoisted through the hatch.

The defendants filed separate answers and each denies that Malloy was working for the company or

carrying out an order given by Camp when injured, or that either of the defendants was negligent in any of the particulars enumerated by the plaintiff. Each defendant alleges affirmatively as a further and separate defense that Malloy was injured

"when the said plaintiff was occupied in and about his own personal business and affairs and such as had no connection with or relation to the business or affairs"

of the Marshall-Wells Hardware Company; and that his injury was "the result of his own acts," and if there was any element of negligence it was not the negligence of either defendant. In addition to the denials and the defense already mentioned the company pleads two other defenses, one of which is to the effect that the Circuit Court lost jurisdiction when the company filed a petition and bond for the removal of the cause from the Circuit Court for Multnomah County to the District Court of the United States for the District of Oregon, while the other avers that a judgment was rendered against the plaintiff in an action prosecuted by him against the corporation for the injury received in the barn.

The assignments of error relate to the refusal of the Circuit Court to grant the application for removal to the federal court, the admission of certain testimony given by the witnesses Frank A. Doney, Philip Erickson and William Malloy, denial of the motion for an involuntary nonsuit, the giving of specified instructions, and the refusal to give certain instructions requested by the defendants.

REVERSED IN PART AND AFFIRMED IN PART.

For appellants there was a brief over the names of *Messrs. Emmons & Webster* and *Mr. J. L. Conley* with oral arguments by *Mr. Lionel R. Webster* and *Mr. Conley.*

For respondent there was a brief over the names of *Mr. A. H. McCurtain, Mr. J. W. Kaste, Messrs. Wilbur, Spencer & Beckett* and *Messrs. Bauer & Greene,* with oral arguments by *Mr. McCurtain, Mr. Kaste* and *Mr. S. C. Spencer.*

HARRIS, J.—21. The evidence shows that Malloy brought an action against the Marshall-Wells Hardware Company for damages on account of the injuries sustained by him and that such action terminated in an involuntary judgment of nonsuit. This judgment did not bar the instant action: Section 184, L. O. L.

The plea that the Circuit Court lost jurisdiction when the company filed a petition for removal cannot be sustained, for the reasons stated by Mr. Justice McCAMANT in the opinion rendered after the first hearing of the appeal.

An examination of the record convinces us that the testimony of the witnesses Frank A. Doney, Philip Erickson and William Malloy was properly received and was admissible for the purposes stated in the original opinion.

We are urged to pause and consider most carefully before definitely committing ourselves to the construction which the original opinion places upon Chapter 332, Laws of 1913, amending Section 171, L. O. L. Another minute examination of this question persuades us to concur with the reasoning, so convincingly expressed by Mr. Justice McCAMANT, and we therefore reaffirm what is said in the original opinion concerning the form of a bill of exceptions. To the argument that this conclusion overrules certain prior decisions, we reply by borrowing the language used by John Philpot Curran when presenting a motion for a new trial for A. H. Rowan: the high office of the

court "is never so dignified as when it sees its errors and corrects them."

22. The remaining assignments of error relate to the denial of the defendants' motion for a nonsuit and to the giving as well as the refusal to give certain instructions; and the decision of all these assignments of error depends upon whether Malloy was injured while working for the company. The plaintiff contends that he was engaged in work for the corporation and that he was performing such work in compliance with orders given by Camp, the superintendent, while the defendants strenuously insist that Malloy was hurt at a time when he was working for himself and not for the company. If there was no evidence at all tending to show that Malloy was working for the Marshall-Wells Hardware Company then the trial Court erroneously instructed the jury and the judgment must be reversed; but if there was evidence tending to show that Malloy was injured while performing work for the company, then the question of whether or not he was in truth working for the company was one of fact for the jury to determine from the evidence and that question of fact cannot be re-examined or decided by this court: *Sullivan* v. *Wakefield,* 65 Or. 528, 535 (133 Pac. 641). It is necessary to give an account, more or less in detail, of the duties imposed upon the plaintiff, the authority exercised by Camp, the hatch and appliances used for hoisting articles to the second floor of the barn, and the wood hauled to the barn.

In his capacity as barnman or barn boss Thomas Malloy was obliged to arise about 4:15 each morning and feed, water and curry the horses so that they would be ready for the teamsters to harness by about 6:30 A. M. After the teamsters had gone with the

horses the plaintiff cleaned the barn and this work usually kept him engaged until about noon when the teamsters returned with the horses so that they could again be watered and fed. From one o'clock until about 4 P. M. Malloy did not have much work to do except to answer the telephone and wait on such customers as might wish to purchase gasoline, a supply of which was kept at the barn not only for the automobiles used by the company but also for sale to the public. About 4 P. M. Malloy started in to make preparations for the return of the teams and vehicles and as a rule he did not complete his day's work until 8 or 9 P. M. If, however, he washed the trucks, wagons or automobiles his work was not finished until a later hour. If a horse became sick at night and needed attention, Malloy "had to get up and do it." As Malloy expressed it, he "was on duty 24 hours a day." No employees worked under Malloy; he had no control over the teamsters; he was not a foreman. Whenever hay was hoisted to the second floor, however, Malloy "attended to the taking of this hay up there; he managed that" and the men sent to assist in hoisting the hay did what Malloy told them to do while engaged in that work. Malloy had no authority to buy or sell horses or to purchase feed except possibly in small quantities; and, moreover, he was obliged to secure the approval of Camp before he could procure anything from the warehouse for use in the barn. Malloy's books showing sales of gasoline were O.K.'d by Camp. On practically all matters, except the daily routine work done in the barn, Malloy first reported to Camp and secured directions before attempting to act.

R. A. Camp had acted as superintendent since 1904 and had "direct charge of the office affairs and gen-

eral charge of the warehouse, the machine shop and stables." Several of the teamsters were hired by Camp although Harvey seems to have employed most of the teamsters who entered the service of the company. The barnman called upon Camp for orders, but if Camp could not be found then Harvey was called upon. Thomas Malloy says that Camp visited the barn regularly once or twice a day with the exception of a single period covering a few weeks. W. J. Miller, who had charge of the barn in February, 1916, stated that Camp "used to come up to the barn every morning." Camp bought and sold horses for the company. Thomas Malloy testified that the hatch was enlarged pursuant to orders given by Camp. At some time subsequent to September 11, 1915, William Malloy built a railing around the hatch; afterwards he took the railing down, but according to his testimony, "Mr. Camp told me to put it back afterwards." A notice containing rules and regulations for the guidance of teamsters and the barnman over the letters R. A. C., Camp's initials, was posted near the door to the washroom. Camp caused a small workshop to be built on the second floor and a paint-shop on the first floor. Camp exercised supervising authority not only over Thomas Malloy, but also over William Malloy, who acted as barnman from September 16, 1915, to February, 1916, as well as over W. J. Miller, who succeeded William Malloy.

The hatch was in the second floor when the company first occupied the barn. An ordinary hay-carrier and track were built in next to the roof. The hay-carrier was so arranged that hay and other articles could be hoisted through the hatch and by means of the carrier conveyed to other parts of the loft. After being used a couple of years the hay-carrier broke and a pulley

was then fastened to the carrier track above the hatch and a rope was run through the pulley. Thomas Malloy swore that "it was the men from the warehouse that first rigged it (block and tackle) up." At first the hatch was only three feet by four feet in size and had but one door; but about a month after the company took possession of the barn the opening was enlarged so as to make its dimensions about four feet by six feet, and two doors were placed over the hatch, although the witness W. J. Miller says that the doors were open "mostly." Thomas Malloy testified that the hatch was enlarged pursuant to directions given by Camp. The pulley and rope were used in hoisting hay, grain, feed, wood and other articles from the first floor through the hatch and on to the second floor. William Malloy says that the hay and grain were hoisted to the second floor "afternoons and evenings, just depending on when the grain and hay came," and "if there was enough teamsters, the teamsters would help. If there was not, sometimes they would send up a man, and sometimes they would not, to help put it away";

but if, however, a carload of hay or grain was received at the barn "they always put a gang on it." When they "put a gang on it" the hay or grain was pulled "up by hand," and a snatch-block or anchor-pulley was not used. Whenever articles were not hoisted to the second floor "by hand" the snatch-block was used just as it was used when the plaintiff was hurt. Three teamsters, Philip Erickson, Ed Lahey and Rex Gable, each testified that he had helped Malloy hoist hay with the use of the two pulleys and rope; and W. J. Miller, another teamster, stated that he had assisted in taking wood as well as hay to the second floor with the aid of the two pulleys and the rope. Gable said that during

the time of his employment from 1910 to 1912 the snatch-block was fastened to a board nailed across the end of a stall as many as 15 or 20 times. When asked: How many times he had "rigged up that apparatus to take things upstairs?" William Malloy answered: "Several times, a good many times." Thomas Malloy stated that the anchor-block and sling-ropes were "used 10 or 12 times a year." When the hay-carrier was installed a piece about 30 feet in length was cut off the main rope which was used on the carrier and this piece was made up into four sling-ropes. The original purpose was to use these sling-ropes "as and for a sling-rope * * before the track was broke down," but after the pulley was fastened to the hay-carrier track one of the sling-ropes was always used "for an anchor rope" for the snatch-block for the reason that, according to the testimony of William Malloy, "there was no other rope." The plaintiff testified that the sling-ropes were the only ropes that were "around there for any such purpose as that"; and that they were "used for all kinds of purposes there in the barn." Thomas Malloy also stated that whenever a sling-rope was needed for the purpose of anchoring the snatch-block no particular one was selected but "we just took whichever one came." When the plaintiff and Miller reached the second floor the plaintiff threw two or three of the sling-ropes down to the first floor so that William Malloy could use one of them for anchoring the snatch-block, and it was one of these ropes that was used for tying the block to the board nailed across the end of the stall. Referring to the work of hoisting articles to the second floor with the use of the two pulleys or blocks and the rope, Thomas Malloy was asked: "Was Camp ever around there when you were doing this

work?'' and he answered thus: ''Well, I think he was sometimes: I could not say for sure though. He was there sometimes when there was hay being hoisted up and grain also.''

The accident occurred about 5 o'clock Saturday afternoon. While the teamsters did not ordinarily finish their work by noon on Saturdays, still if a teamster did complete his work by noon or at any hour in the afternoon before the usual quitting time and returned to the barn with his horses the remainder of the day was his ''own time,'' and he owed no further duties to the Marshall-Wells Hardware Company until the following Monday morning. William Malloy, who drove the horse when his father was hurt, worked for the company; but he had finished his work and was helping with the wood because his father asked him to help. W. J. Miller ''pulled in the barn about 4 o'clock'' and that was the end of his ''day for Marshall-Wells''; and not having anything else to do and wishing to help the plaintiff, Miller helped Thomas Malloy put the wood upstairs when asked by the latter. The plaintiff had not done all his chores when injured, although he ''had part of them done.''

It will be recalled that Camp directed the plaintiff to move to the new barn in October, 1910; and it may be added that when the plaintiff went to the new barn he did so with the understanding that he was to move his family to the barn and live there. Thomas Malloy testified that Camp ''told me that I should move my family to those rooms as quick as possible.'' The plaintiff moved to the apartments in the barn; but his wife and children were not able to follow him until five or six days afterwards. Thomas Malloy states that when he moved into the apartments he found ''a big pile of wood,'' consisting of ends of boards piled

on the second floor of the barn and next to a door leading into the apartments. William Malloy said that the pile contained "a scant cord." In connection with the incident of the plaintiff being directed to move to the new barn with his family a very significant circumstance is found in a conversation which plaintiff claims he had with Camp. Thomas Malloy says that Camp came to the new barn one morning after the first pay day "and looked around and saw that everything was all right," and before going away he said:

"'Tom, there should be some arrangements made about your wages or salary here.' I stopped and thought it over a minute or so and says, 'Well, it is up to you.' He said, 'Your salary will be $70 a month; those rooms upstairs, free wood, free water, free light and free wood.' Now, the free wood part of it, he drawed back a little bit on that. He said to me that he didn't think I would ever have to buy any wood, that there would be all kinds of scrap wood at the warehouse; so I took it for granted that my wood would be free."

The room on the first floor, referred to as the dining-room, was furnished with tables, benches and a stove for the use of teamsters at the noon hour. The teamsters used the stove for warming themselves and for heating coffee. There were two places in the barn where wood was burned: one, the apartments where the plaintiff lived with his family; and the other, the stove used by the teamsters. With the exception of four or five loads of cordwood and slabwood purchased by the plaintiff, and two sacks of coal which the company caused to be sent to the barn for the use of the teamsters, the only fuel burned by the plaintiff or the teamsters came from the warehouse. The evidence shows that there was a daily accumulation of ends of boards and scraps of wood in the warehouse where

goods and wares were received and unpacked and again packed for delivery to customers. The defendants contend that while the plaintiff and teamsters were at liberty to help themselves to the wood which accumulated in the warehouse, nevertheless they were not obliged to do it, and the defendants insist, too, that the company did not recognize any obligation to furnish wood to the plaintiff or to the teamsters. The evidence shows that if at any time there was no wood on the first floor of the barn the teamsters went upstairs and took wood from the pile next to the Malloy apartments. In further support of their position that the company did not consider itself under any obligation to furnish wood to the plaintiff, the defendants point to the fact that on one occasion about two or three weeks prior to the accident the plaintiff hauled three or four loads of wood from the warehouse in the evening after working hours. For the purpose of showing that the company recognized an obligation to furnish wood to him, the plaintiff points to evidence showing that at different times covering the period from 1910 to the date of the accident several teamsters hauled wood to the barn during working hours and pursuant to the orders of Harvey or Camp; and that wood was not only hauled to the barn by those teamsters, but was taken upstairs by them in compliance with directions given by Harvey or Camp. The plaintiff also explains that when he hauled the three or four loads after working hours he was following orders sent to him. While it is true that the teamsters sometimes hauled boxes filled with wood from the warehouse when they went to the barn for noon, it is also true that teamsters hauled wood from the warehouse to the barn during working hours. Frank A. Doney "worked in the warehouse a while, cleaning up part

of the time," and pursuant to directions given by Jim Carr, who had control over that work, Doney "cleaned and swept around there, picking up odds and ends and pieces of boards" and "laid them aside until morning to be sent down on the elevator" for "they were to go to the barns." Commencing with 1910 Rex Gable worked as a teamster for about two and a half years, and he says that during that period the teamsters hauled wood from the warehouse and put it under the stairway in the barn, "except sometimes they was taken upstairs." Philip Erickson worked as a teamster from April, 1913, until June, 1916, and he testified that in the fall of 1915 at some time prior to the time when Malloy was hurt he hauled three or four loads of wood from the warehouse in obedience to orders given by Harvey, and that he deposited the wood in the barn "right by the corner behind the little auto shed"; and Erickson also stated that he did this hauling "as a special trip" and that he did not do it when going to or from his work at night. Ed Lahey, another teamster who was in the service of the company for a year commencing with April, 1915, testified that he hauled five or six loads of wood from the warehouse to the barn before Malloy was hurt; that Harvey told him to haul this wood; that he did the hauling during working hours and not at the noon hour or in the evening and that he piled the wood "right in the automobile garage." W. J. Miller worked for the defendant for a period of seven months commencing with August 3, 1915, and he testified that prior to the time of the accident he hauled a load of wood about 11 o'clock one morning from the warehouse to the barn in obedience to directions given by Harvey "to haul it up to the barn"; and that he put the wood "back along the automobile shed there." Another witness, Amos A.

Abert, drove a truck from October, 1913, until November 5, 1914, and he told the jury that he frequently took wood from the warehouse to the barn "just whenever we didn't have anything to do and there was anything to take up." This witness also testified that at least on one occasion Harvey told him to take wood from the warehouse to the barn and to put the wood "up in the loft." Abert further stated that about three months before he left the service of the company, and while at the warehouse, Camp told me to take "the wood (pieces of boxes in the warehouse) up in the barn and put it up in the loft." The load hauled "by orders of Mr. Camp" and the one hauled "by orders of Mr. Harvey" were hoisted by means of a block and tackle through the hatch and on to the second floor and then piled next to Malloy's apartments by Abert and some other drivers. At least one of the loads hauled by Abert was taken to the barn during working hours, and the fair inference is that the other load was also hauled during working hours. It appears from the testimony that for some indefinite period after 1910, wood hauled from the warehouse was deposited near the foot of the stairs in the barn. Malloy had constructed a bin near the foot of the stairway for the purpose of holding the wood deposited there. It appears that some of the teamsters had thrown some waste into the bin. Upon discovering this waste and to avoid the danger of fire, Camp ordered Malloy to tear out the bin and clean up the floor at that place. Malloy obeyed the order, tore out the bin and moved the bin and the wood upstairs; and thereafter apparently all or at least most of the wood taken to the barn, when deposited on the first floor, was placed in or against the so called auto shed. During the year 1915 the company added three stories to its warehouse,

making seven in all. An unusually large quantity of ends of boards accumulated at the warehouse as the result of this construction work. When Thomas Malloy was hurt ten or fifteen loads had been hauled and deposited at or near the "auto shed"; and in connection with the fact that there was such a large quantity of wood dumped at this place on the first floor of the barn it is appropriate to call attention to a conversation which Thomas Malloy claims to have had with Harvey a short time, probably three or four weeks, before the accident.

In the language of Thomas Malloy, while a witness,

"Mr. Harvey, the shipping clerk, came over from the warehouse to the barn, and he stood around a little while and then he says, 'Tom, have you got any room for wood?' I said, 'All kinds of it.' He asked me where I was going to put it. I told him over in that corner over there [describing it * *]. He said he would send someone up there to the barn that would back the teams in in unloading. I asked him in what way he was going to send it and he said he would send it in boxes and barrels and such like as that. I told him that it would not be very long, just while the men were dumping it, and so he didn't say any more, but went and sent the wood up, and he sent five or six or eight or ten loads, probably ten loads."

Referring to the three or four loads of wood hauled one evening after hours, the plaintiff says that two or three weeks before the accident,

"there was an order sent by one of the boys to me that the wood upstairs on the second floor * * (of the warehouse) * * had to be gotten out of there, and it would have to be taken out after working hours on account that they were leaving the big elevator upon those next stories that they were building higher and there was only one elevator in use, and they were using that all the time in working hours, and the wood

had to come down on that elevator to be sent to the barn."

The claim made by the plaintiff that he received orders to haul this wood finds some corroboration in the testimony of James A. White, the night watchman at the warehouse, who stated to the jury that "when Mr. Harvey left the place at the quitting hour he told me that Mr. Malloy was coming after the wood and for me to run the elevator" and that Harvey knew that this wood was "going up to the barn." We now direct attention to a conversation which Thomas Malloy says he had with Camp a few days before the accident. The plaintiff points to this conversation in support of his contention that he was ordered by Camp to take the wood upstairs, and that therefore when the plaintiff was injured he was acting in obedience to orders given by Camp. According to the testimony of Thomas Malloy,

"Mr. Camp came in the barn one morning and those stalls were in bad condition and I called his attention again to them, and he went and looked at them and he said, 'Yes, they are in very bad condition,' and he said as soon as they got done work on the warehouse he would get some man to put new bottoms in the stalls. When we got through talking about that he went out in the other department, where the wagons and automobiles were kept, and he asked me, he says, 'Tom, did anybody ever come here to look at any of these extra wagons we had here, those extra wagons for sale?' And I says, 'No, nobody ever came around here, only one man, and he didn't intend to buy a wagon.' He said, 'Did he speak about it?' I said, 'Yes.' He said, 'What wagons did he ask about?' I said, 'The Columbia Hardware wagon.' And he said, 'What price would he pay for it?' I said, 'Fifteen dollars and I knew you would not take that.' So he started over toward these extra wagons standing near

the door and got out by the opposite hall, and when he got out in the middle of the floor he said, 'Tom, you have got a pile of wood there.' I says, 'Yes.' He said—it was piled up and scattered around a little of it under the wagons—and he said, 'You should have built a bin around it.' I says, 'There was no necessity for it, but when I got a little time I was going to move that wood upstairs.' He says 'Well, it should be taken out of here, it is in the road.' "

Mrs. Ann Malloy corroborates her husband by testifying that she was on the first floor cleaning up the quarters used by the teamsters and heard the following conversation between her husband and Camp:

" 'Tom, you have a big pile of wood here.' He says, 'It is in the way under the wagons; you ought to pile it up or do something with it,' and he says, 'Well, I have not had time to take it upstairs; I was going to take it up just as quick as I got a little spare time.' 'Well,' he says, 'something ought to be done with it; it ought to be got out of here.' That is all that was said."

It will be remembered that the box containing wood fell back to the first floor when the sling-rope broke. This box of wood was pushed into the dining-room and the wood burned by the teamsters in the stove in the dining-room. Camp placed William Malloy in the position of barnman after the accident, and on the following Monday evening after work hours the wood which had been piled at or against the auto shed was hoisted upstairs by William Malloy, Leonard Malloy, Ed Lahey, W. J. Miller and Philip Erickson.

23. There was evidence to support the contentions of the plaintiff, and while it is also true that the defendants offered evidence which contradicts the evidence offered by the plaintiff it is not our province to attempt to ascertain whether Malloy was in truth working for

himself or whether he was hurt working for the company at the time he was hurt, because it was the exclusive province of the jury to determine that question of fact and our only inquiry now is whether the record contains evidence entitling the plaintiff to go to the jury for a decision of a controverted fact. The plaintiff contends that he was to receive free wood as a part of his compensation. It was for the jury to say whether such was the agreement. There was direct evidence tending to show that such was the agreement, and in addition to this direct evidence there was the significant circumstance of wood being piled against the apartments when Malloy moved to the new barn. The plaintiff insists that the alleged agreement concerning free wood was recognized by the company during the entire five year period of Malloy's employment. It was for the jury to say whether hauling wood from the warehouse to the barn by teamsters pursuant to the orders given by Harvey and by Camp constituted recognition of such agreement. The plaintiff contended that he was elevating the wood to the second floor in obedience to orders given by Camp. The conversation attributed by the plaintiff to Camp relative to the removal of the wood from the auto shed was, if believed by the jury, evidence tending to show that Camp ordered the wood taken upstairs. There was evidence from which a jury could conclude that Malloy was to receive as a part of his compensation free wood to be hauled from the warehouse to the barn, that the defendant company recognized such an agreement by causing wood to be hauled from the warehouse to the barn by the company's teamsters and during working hours, and by Harvey, the shipping clerk, and by Camp, the superintendent, each ordering teamsters not only to haul wood to the barn, but to take it up into the loft; that two or three weeks prior to the accident the

plaintiff received express orders to haul wood from the warehouse to the barn; that the wood which was piled in the automobile shed was placed there pursuant to orders given by Harvey; that Camp ordered all the wood which had been piled in the auto shed to be moved, and that Thomas Malloy at the time he was hurt was engaged in carrying out such express order given by Camp; and that the company even recognized an obligation to furnish the teamsters with wood for the reason that on one occasion two sacks of coal were sent to the barn for the use of the teamsters.

If the jury believed the testimony offered in behalf of the plaintiff, then the conclusion is inevitable that most if not all the wood lying in or near the auto shed on September 11, 1915, had been hauled from the warehouse and dumped in the barn pursuant to direct orders given by Harvey and Camp. All that wood, with the possible exception of the three or four loads hauled by the plaintiff, was hauled during working hours by persons acting as employees of the company and at the sole expense of the company. There was much evidence from which the jury could conclude that the company retained its ownership in the wood. The teamsters were at liberty at all times to use from the wood whether lying on the first floor or piled on the second floor. It was for the jury to say whether the wood belonged to the company, or whether it became the property of the plaintiff when he placed it in the boxes to be hoisted upstairs. It was for the jury to decide, too, whether the plaintiff when hoisting the wood was handling Malloy's wood for Malloy's use or whether he was handling the company's wood for the use of the company's employee or employees. Wood had never been deposited at any place on the first floor except at the foot of the stairway and in

or near the auto shed. The place at the stairway had been cleaned up pursuant to Camp's orders, and when he ordered the wood to be taken out of the auto shed it is fair to conclude that he intended that the wood should be taken to the only other place used for storing wood—upstairs; and, indeed, Malloy told Camp that he would take it upstairs. After reading and rereading the record presented to us and giving to it our most careful consideration, it is our conclusion that the plaintiff was entitled to have the jury determine whether he was engaged in a work for the company when he fell through the hatch and was injured. The court told the jury to find for the defendants if the plaintiff was doing his own work. The instructions were plain and understandable and the jury could not have been misled; and consequently the verdict of the jury is conclusive evidence that the jury found that the plaintiff was doing work for the company at the time of his injury. The instructions of the court presented the respective theories of the litigants. The court gave no instruction which can be said to be prejudicial to the company, and every instruction which the company requested and to which it was entitled was given by the court.

The verdict and judgment were against Camp, the superintendent, as well as against the Marshall-Wells Hardware Company, the employer. Camp admitted that he was a superintendent, and moreover there was ample evidence from which the jury could find that Camp had charge of all the work done in the barn; that he caused the hatch to be enlarged and the block and tackle to be installed so that articles could be hoisted to the second floor; and that he had actual knowledge that the hatch and blocks and tackle were used for the purposes for which they were intended.

The plaintiff contends that since Camp was the superintendent in charge of the work at the barn, the Employers' Liability Act applies to Camp with the same force and to the same extent as it does to the Marshall-Wells Hardware Company.

24. The Employers' Liability Act presents itself in two aspects, for it imposes two kinds of liability: the one civil, and the other criminal. Section 3 makes it the duty of foremen as well as other persons having charge of the particular work to see that the requirements of the statute are complied with, and a failure may be punished by a fine or imprisonment or both. Viewed in its criminal aspect the Employers' Liability Act is plainly intended to make a foreman or person having charge of the particular work criminally liable for failure to see that the requirements of the statute are complied with; and to this extent, at least, the act has extended the liability of a foreman.

It is possible, although it is not necessary to decide, that the civil aspect of the statute in turn presents itself in two phases: one where the statute applies with all its incidents and one where it does not. The Employers' Liability Act defines the duties which shall be performed in certain kinds of work, and for convenience we may treat these defined duties as the principal element of the statute and all else as incidents; and while it may be assumed that the statute imposes upon a foreman as well as upon the owner the obligation of performing those specified duties, nevertheless it must be remembered that our present inquiry is whether, aside from the specified duties imposed by the enactment, all or any of the incidents which characterize the statute are applicable to a mere foreman. If death results from a violation of the Employers' Liability Act certain named persons sue as individuals

and not as representatives of the estate of the deceased, and the right of action is without limit as to the amount of damages; but if the action is not brought under this statute it is prosecuted by a representative of the estate and there is a limit to the amount of damages which may be recovered: Section 380, L. O. L. If an action is governed by the Employers' Liability Act there are certain defenses, including contributory negligence, which cannot be pleaded by the defendant as a bar; but if an action is not governed by this statute, those certain defenses, including contributory negligence, are available as a bar to the action. When we say that an action for damages is completely within the embrace of the Employers' Liability Act we must be understood to mean that the action is one which is properly prosecuted by the person who was injured, or, in case of his death, by an individual belonging to one of the classes of persons specified by the statute, against a proper party defendant who is prohibited from pleading contributory negligence, and certain other defenses, as a bar. We have recently held that one who is a mere member of the public, as distinguished from a person who is an employee or engaged in work on or about a wire charged with a dangerous voltage of electricity, does not come within the complete embrace of the Employers' Liability Act, and that therefore the widow of a mere member of the public who has been killed by coming in contact with an electric wire cannot recover damages from the owner of the wire; but the remedy is an action by a representative of the estate of the deceased: *Turnidge* v. *Thompson*, 89 Or. 637 (175 Pac. 281). There may be persons, as possibly a member of the public, who cannot as a party plaintiff sue an owner under the Employers' Liability Act, even though such owner may owe to the

person suing one or more of the duties prescribed by such act; and although that person as such member of the public may not come within the complete embrace of the statute and cannot sue under the act, it is possible that it may nevertheless be true that such person can sue and allege negligence, and, as was done in *Peterson* v. *Standard Oil Co.,* 55 Or. 511 (106 Pac. 337, Ann. Cas. 1912A, 625), prove the alleged negligence by showing the violation of a duty, imposed by the Employers' Liability Act as a statute enacted for the protection of the public, and upon such proof of negligence be entitled to recover, unless guilty of contributory negligence. Even though an action against a foreman does not come within the complete embrace of the Employers' Liability Act, it is possible that it may nevertheless be true that the foreman may be sued for negligence, and such negligence be proved by showing a failure to perform a duty imposed upon the foreman by the Employers' Liability Act and a recovery had in the absence of contributory negligence, on the theory that the violation of the statute is negligence *per se* under the doctrine announced in *Peterson* v. *Standard Oil Company, supra.* The civil aspect of the Employers' Liability Act then may possibly present itself in two phases: One where the statute is available only for the purpose of fixing the duty of the party sued, and none of the incidents of the statute attend an action for damages; and the other, where both the plaintiff and the defendant are completely within the embrace of the statute so that both the principal element and also the incidents are applicable to an action for a violation of the enactment.

25–27. The trial court charged the jury that if the plaintiff was injured while engaged in work for the Marshall-Wells Hardware Company, and if his injury

was caused by a failure of the company to comply with one or more requirements of the Employers' Liability Act as charged in the complaint, then this statute completely embraced not only the company but also Camp, the superintendent; and hence the concrete question for decision is whether the Employers' Liability Act completely embraces a foreman or superintendent so that the statute, with all its incidents, is applicable in an action for damages against the foreman or superintendent. By its express terms the act has abolished the defense of contributory negligence. Section 6 reads as follows:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

In *Schaedler* v. *Columbia Contract Company,* 67 Or. 412 (135 Pac. 536), it was held that Section 6 just quoted does not apply to all actions for personal injuries, but that it only applies to actions brought under the Employers' Liability Act. In other words, what is said in Section 6 is only one way of saying that in any action brought under this statute the contributory negligence of the person injured shall not be a defense; or, to say the same thing in another way, contributory negligence is not available as a defense against any action for damages brought under this statute. The act is entitled, "A bill to propose by initiative petition a law" which among other things declares "what shall not be a defense in actions by employees against employers." The title of the act is a part of the statute and can be looked to for the purpose of ascertaining the meaning of the statute; and, moreover, an act adopted by the people in the exercise of the initiative as well as an act passed by the legislative assembly must comply with the requirements of Article IV,

Section 20, of the State Constitution: *Turnidge* v. *Thompson, supra.* The foreman or superintendent is not an employer; indeed, by the express terms of the statute itself the foreman or superintendent "shall be held to be the agent of the employer *in all suits for damages* for death or injury suffered by an employee." The defense of contributory negligence is only withdrawn from the employer. Even though a foreman may become criminally liable by force of the terms of the Employers' Liability Act and even though it may be possible, but it is not decided, that the failure of a foreman to perform a duty imposed by the act is negligence *per se* within the doctrine of *Peterson* v. *Standard Oil Co.*, 55 Or. 511 (106 Pac. 337, Ann. Cas. 1912A, 625), nevertheless it is obvious that the defense of contributory negligence is not withdrawn from a foreman or superintendent who is not the employer but by the express provisions of the statute is declared to be an agent of the employer.

28. It is true that Section 3, which provides for punishment by fine or imprisonment in case of failure to obey the mandate of the statute, declares that such punishment "shall not affect or lessen the civil liability of such persons as the case may be." It is manifest, however, that the excerpt quoted from Section 3 neither enlarges nor lessens "the civil liability of such persons," but this language is evidently inserted in the section merely for the purpose of removing even the possibility of claiming that punishment by fine or imprisonment shall relieve the person fined or imprisoned from liability for damages. The language quoted from Section 3 simply leaves the subject of civil liability at large; and, moreover, the words, "as the case may be," are themselves significant when con-

sidered in connection with the different classes of persons named in the action.

A careful examination of the Employers' Liability Act, together with its title, makes it obvious that the act does not completely embrace an action for damages against a foreman or superintendent like Camp; and consequently it becomes necessary to reverse the judgment as against Camp. As against the Marshall-Wells Hardware Company the judgment is affirmed; but as against Camp the judgment is reversed.

REVERSED IN PART AND AFFIRMED IN PART.

BURNETT, J.—I dissent from what is said in the opinion of Mr. Justice HARRIS as well as from the language of Mr. Justice MCCAMANT in the former decision of this case (173 Pac. 267), on the frame of a bill of exceptions. Otherwise, I concur in the result reached by Mr. Justice HARRIS.

Rehearing denied December 10, 1918.

ON PETITION FOR SECOND HEARING.

(176 Pac. 589.)

In Banc.

For the petition there was a brief presented by *Messrs. Emmons & Webster* and *Messrs. Stapleton, Conley & Stapleton.*

Mr. A. H. McCurtain, Mr. J. W. Kaste, Messrs. Wilbur, Spencer & Beckett and *Messrs. Bauer & Greene,* opposed.

HARRIS, J.—The petition for a rehearing filed by the Marshall-Wells Hardware Company presents no

new questions. It is stated, however, in the petition that the Circuit Court for Multnomah County did in truth enter an order on February 7, 1917, extending the time within which the defendant could plead to February 17, 1917, and that therefore the petition and bond for removal to the federal court alleged to have been filed on February 15, 1917, were filed within the time required by law, and consequently operated to deprive the state court of jurisdiction.

The complaint was filed on December 13, 1916, and the company admits that it was served with a copy of the summons and of the complaint on December 14, 1916. The second separate answer pleaded by the company alleges that on February 15, 1917, this defendant filed a petition and bond for the removal of the cause from the state court to the federal court; that the state court refused to make an order removing said cause, "but on the contrary directed, ordered and adjudged that the same be not removed." A copy of the petition and bond alleged to have been filed on February 15, 1917, are attached to the answer and marked Exhibit 1. After reciting the date of the commencement of the action and stating the date when the company was served with summons and complaint Exhibit 1 avers that within the time allowed by law the company filed a petition for removal of the cause to the federal court and a copy of this petition is marked Exhibit "A" and is attached to Exhibit 1. Exhibit 1 avers that upon the filing of Exhibit "A" the cause was removed to the federal court;

"That thereafter the plaintiff filed a motion to remand said cause to the state court which motion was allowed and said cause was duly and regularly remanded. That thereupon and pursuant to the law of this state and the rules and practice thereof and of this court an order was duly and regularly made and en-

tered herein extending and enlarging the time within which this petitioner was required to plead or answer herein to and including February 17, 1917."

The reply filed by the plaintiff denies every allegation contained in the answer,

"except that said plaintiff admits that after the time allowed by law for the removal of this cause to the District Court of the United States for the District of Oregon, said defendant attempted to remove the same but was unsuccessful."

In brief, the answer shows through Exhibit 1 that the company filed two petitions for removal. The first petition was granted and the cause was removed to the federal court; but upon motion of the plaintiff the federal court remanded the cause to the state court. The defendant is relying upon the second petition for removal; and the company must therefore present a record showing that the second petition was filed in time. The answer merely alleges that the petition was "duly and regularly filed" pursuant to the acts of Congress. The reply denies that the petition was filed in time. Aside from the allegation quoted from the body of the answer and the excerpt taken from Exhibit 1 there is nothing in the record presented to us to show that the state court made an order extending the time within which the company could plead or the date when such order was made. Aside from the allegations in the answer there is nothing in the record to show the date upon which the second petition was filed.

29. The petition for rehearing states that the order of removal, based upon the first petition, was signed and filed on December 22, 1916; that the transcript on removal was filed on January 17, 1917, in the federal court; that on January 24, 1917, the plaintiff filed a petition to remand; that on February 5th, the federal court made an order remanding the case to the state

court; that on February 7th, the state court made an order extending the time within which defendant could plead to February 17, 1917; that the second petition for removal was filed on February 15th, and this application was denied by the state court on February 16, 1917. The record upon which this appeal was twice argued and twice decided does not give us all the information contained in the petition for a rehearing; and it is therefore suggested in the petition for a rehearing that we order the record to be supplemented so as to supply the omissions. The appeal has been twice argued; the question arising out of the second affirmative defense pleaded by the defendant company has been twice decided adversely to its contention; and we would not now be warranted in making the suggested order: *State* v. *Jennings,* 48 Or. 483, 494 (87 Pac. 524, 89 Pac. 421); *Noble* v. *Watrous,* 84 Or. 418, 426 (163 Pac. 310, 165 Pac. 349); 3 Cyc. 144; 4 C. J. 497.

30. Even though the dates, orders and papers are as stated in the petition for a rehearing, and even though it be assumed that an order extending the time to plead operates as an extension of the time within which a petition for a removal may be filed, nevertheless the company cannot prevail. The second petition for removal was simply an enlarged edition and amplification of the first petition; and therefore in denying the second application the state court merely "did no more than bow to the decision and order of the federal court when it remanded the record": *McLaughlin* v. *Hallowell,* 228 U. S. 278, 286 (57 L. Ed. 835, 33 Sup. Ct. Rep. 465); *St. Paul & Chicago R. Co.* v. *McLean,* 108 U. S. 212 (27 L. Ed. 703, 2 Sup. Ct. Rep. 498).

It will not be necessary further to discuss the questions mentioned in the petition for a rehearing, but it is sufficient to say that we have carefully considered the

arguments again presented by the company and come to the same conclusion which we reached upon the hearing *in banc*. The petition for a rehearing is therefore denied. REHEARING DENIED.

Argued September 19, affirmed October 22, on petition for rehearing former opinion sustained December 17, 1918.

SMITH *v.* BOOTHE.

(175 Pac. 709.)

Judgment—Conclusiveness—Res Judicata—Matters Concluded.

1. Facts identical with those relied on as a cross-complaint in a prior suit, wherein the complaining party drew up the decree, *held* concluded between the parties.

Judgment—Res Judicata—Matters Concluded.

2. A judgment upon the merits is a bar to a subsequent action between the same parties on the same claim, both as to matters that might have been as well as those that were actually litigated.

ON PETITION FOR REHEARING.

Fraud—Opinion—Worth of Property.

3. Statements by purchasers of mortgage, attorneys for mortgagors, that premises were not worth more than was due them, and that they had procured all rights and title of mortgagors, made to mortgagors, were mere matters of opinion, not constituting actionable fraud.

Fraud—Unactionable Threat or Bluff.

4. Statement by purchasers of mortgage, attorneys for mortgagors, to the mortgagors, that they, the purchasers, had been damaged in reputation and would not permit redemption after foreclosure by them without paying damages in addition to money required to redeem, was a mere threat, not constituting actionable fraud on the mortgagors.

Fraud—Allegations—Sufficiency of Evidence to Sustain.

5. In suit by mortgagors against attorneys, purchasers of mortgage, who foreclosed, and, as it was alleged, by false statements prevented mortgagors from securing money to redeem, evidence *held* insufficient to sustain allegations, having shown merely that defendants stood on legal rights as purchasers at execution sale under decree in foreclosure suit.

Judgment—Merger—Nature of Relief.

6. Where attorneys purchased a mortgage and foreclosed, mortgagors being their clients, and court in foreclosure decree executed

trust in favor of mortgagors arising from confidential relation, by setting aside deed procured by attorneys, and declaring mortgagors to be owners, subject to lien of mortgage, confidential relation of attorneys and its abuse was merged in the decree.

Attorney and Client—Fiduciary Relation—Purchase of Mortgage by Attorneys.

7. Attorneys could buy and foreclose mortgage executed by clients, where they did not purchase at discount and undertake to charge clients for full face of mortgage.

[As to contracts of attorneys which are void as against public policy, see note in 13 **Am. St. Rep.** 297. See, also, note in 139 **Am. St. Rep.** 598.]

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1.

The history of this case, so far as it is of interest here, is about as follows: In the month of June, 1912, the defendant William P. Richardson purchased from Lucy A. Lumsden a promissory note secured by mortgage on certain real property executed by the plaintiffs herein, and in the same month began a suit to foreclose the same. These plaintiffs filed an answer to the complaint in foreclosure, wherein they allege that Richardson is an attorney at law, and that in April, 1912, they, being unable to meet the payments due upon the aforesaid note, which was for the sum of $10,000, employed him to negotiate a new loan for them in the sum of $15,000, payable three years later; that having undertaken the employment, he represented to them that in order to get the title of the realty into such shape that a loan could be secured, it would be necessary for them to convey the legal title to a party to be named by him, which was done, the deed running to one Edith King; that at the time of making such conveyance Richardson paid to them the sum of $2,000, explaining that such sum was a part of the new loan he had secured for them, and that the remainder would be applied to the payment of the prior

mortgage, accrued interest, and taxes; that just prior to the execution of the aforementioned conveyance, they were served with copies of the summons and complaint in the foreclosure suit, and that Richardson then represented to them that the suit was merely a step in the process of clearing the title to the premises and would not affect their rights thereto; that he now asserts title to the property through the conveyance to Edith King, who, it is asserted, holds the title for his convenience. They then allege the falsity of the representations so made, and their reliance upon them, and conclude with the following prayer:

"Wherefore, these defendants and cross-complainants pray and that this court will decree:

"1. That these defendants and cross-complainants, Emma A. Smith and Mary J. Cole, are the owners in fee simple of said premises.

"2. That said plaintiff and Edith King hold the legal title so vested in them as security only for the repayment of said Two Thousand Dollars, interest and taxes, if any, paid by them.

"3. That should the court find that said plaintiff is the owner and holder of the note and mortgage set out in his complaint, that the transfer of said note and mortgage to him, together with the conveyance to him by said Bank & Trust Company and the conveyance by these defendants to Edith King, constitute but one instrument intended as, and declared to be, a mortgage to secure the payment of said new loan agreed to be secured by said plaintiff, and that the amount of said new loan be decreed to be the principal amount represented by note and mortgage set out in plaintiff's complaint, plus the interest due thereon, plus the taxes paid, if any, plus the said Two Thousand Dollars paid defendants by plaintiff, and that the terms of said new loan run three years from June 18, 1912, with interest at eight per cent per annum, and that plaintiff be denied the right to foreclose said mortgage set out in his complaint at this time and his suit dismissed.

"4. That the rights and interests of said purchasers be fully protected as their respective equities may appear; and to reform said instruments.

"5. That said defendants, L. D. Mahone, W. Bullis, M. L. Hamitt, Mrs. J. F. McKinney, W. G. Bohn, American Bank & Trust Company, and Will Wright, Superintendent of Bank, G. A. Schwartz, and cross-defendants, Quartz Gold Mining Company, a corporation, and F. P. Tobin, receiver of Mount Scott Bank, a corporation, have no right or interest in or to said premises.

"6. That these defendants and cross-complainants be given such other and further relief as may appear just and equitable in the premises."

To this answer there was a reply filed denying the affirmative matter, and pleading further as follows:

"1. That prior to the time the plaintiff purchased said note and mortgage, he had informed these defendants that he was intending to purchase the same and notified them that he would foreclose said mortgage unless the interest was paid, whereupon said defendants said they could not pay the interest or make any payment thereof, but urged the plaintiff to find a purchaser for their interest in said premises, and in order to make suitable provision for the execution of a deed of conveyance to such purchaser as the plaintiff should find for said premises, on or about the 12th day of June, 1912, said defendants authorized the American Bank & Trust Company of Oregon and Will Wright, Superintendent of Banks, in charge of the liquidation of said American Bank & Trust Company of Oregon, to make, execute and deliver a good and proper deed of conveyance of said real estate to the plaintiff, but such deed to be so executed by said American Bank & Trust Company and Will Wright as Superintendent of Banks, was to be held by these defendants until such time as the plaintiff might find a purchaser for said property so that upon making a sale, the plaintiff could be in a position to convey the said lands to such pur-

chaser, but said deed was not executed by said American Bank & Trust Company of Oregon and Will Wright, Superintendent thereof, until the 25th day of June, 1912, seven days after the execution of the deed by these defendants to Edith King, the purchaser of said premises, as hereinafter mentioned.

"2. That after authorizing the American Bank & Trust Company and Will Wright, Superintendent of Banks, in charge of liquidation of said bank, to execute said note of conveyance to the plaintiff, said defendants, Emma A. Smith and Mary J. Cole, together with one Thomas H. Ruddy, their attorney in fact, repeatedly called upon the plaintiff and urged him to find some one who would be willing to buy their interest in said property. And in accordance therewith the plaintiff procured a purchaser, namely: Edith King, who was willing to pay said defendants the sum of $2,000 for all their right, title and interest in and to said premises, subject to the mortgage thereon. That after finding said purchaser the plaintiff discovered that these defendants had not conveyed the property belonging to them and described in said mortgage to said American Bank & Trust Company, and informed the defendants that in addition to the deed so authorized by them to be made by the American Bank & Trust Company of Oregon and Will Wright, Superintendent of Banks, in charge of liquidation of said Bank, the said Edith King would require a deed of conveyance direct to her from these defendants, and in accordance therewith and with a full knowledge of all the facts and circumstances and with the advice of their attorney, Thomas H. Ruddy, said defendants on the 18th day of June, 1912, executed and delivered to said Edith King their deed of conveyance of said property, conveying to her all their right, title and interest in and to said property and every part thereof for the consideration of $2,000, which was then and there paid to them by the said Edith King."

Thereafter a trial was had, resulting in a decree of which the following is a part:

"The above-entitled cause having been heretofore regularly tried, and the court having made and filed its Findings of Fact and Conclusions of Law, Now therefore on motion of Geo. D. Young, attorney for Emma A. Smith and Mary J. Cole, defendants, and cross-complaints, it is ordered, adjudged and decreed, as follows: * *

"4. That the deed made by Emma A. Smith, Mary J. Cole and Chester Cole on the 18th day of June, 1912, to defendant Edith King, now Edith Richardson, which deed on the 19th day of June, 1912, was recorded in Book 590 at page 144, Records of Deeds of Multnomah County, be and the same is hereby set aside, and

"It is further ordered, adjudged and decreed that the plaintiff and the defendant Edith Richardson convey to the said Emma A. Smith and Mary J. Cole, all right, title and interest conveyed to plaintiff by the said American Bank & Trust Company, and by plaintiff conveyed to defendant Edith King, and also all right, title and interest conveyed to defendant Edith Richardson, and also all right, title and interest conveyed to plaintiff conveyed to defendant Edith King, and also all right, title and interest conveyed to defendant Edith Richardson, by a deed made on June 18, 1912, when the said Emma A. Smith and Mary J. Cole shall pay to the plaintiff herein the sum of $2,000 with interest thereon at 6 per cent from the 18th day of June, 1912, provided the said Emma A. Smith and Mary J. Cole shall make payment of said sum of $2,000 and interest to the plaintiff within fifty days from date of this decree.

"5. That Emma A. Smith and Mary J. Cole are the owners of the land described as follows:

"Beginning at a stone 1320 feet West of the Northeast corner of Section 2, Township 1 South of Range 3 East of the Willamette Meridian; thence South 1870.5 feet to a stone; thence West 455 feet to an iron pipe; thence South 324.7 feet to a stone; thence West 1442.8 feet to an iron pipe; thence North 2190.9 feet to an iron pipe on Base Line; thence East 1869.0 feet along Base Line to the place of beginning, containing 91.8

acres, situate and being in the County of Multnomah, State of Oregon; and that defendant, Edith King, is not the owner of said real estate or any part thereof.

"It is further ordered, adjudged and decreed that the ownership of said land is vested in said Emma A. Smith and Mary J. Cole subject to a mortgage made to Lucy A. Lumsden to secure the sum of $10,000.00 with interest at eight per cent from the 7th day of December, 1910, and the taxes on said premises for the year 1911, to the amount of $147.80 with interest thereon from the 15th day of June, 1912, and subject to the payment of $2,000.00 and interest thereon at six per cent from the 18th day of June, 1912; that said sums of $10,000.00 and interest, $147.80 and interest, and $2,000.00 and interest are payable to the plaintiff herein.

"6. That the said Emma A. Smith and Mary J. Cole shall pay to the plaintiff the sum of $2,000.00 with interest thereon from the 18th day of June, 1912, and shall make said payment within fifty days from the date of this decree, and

"It is further ordered, adjudged and decreed that if the said Emma A. Smith and Mary J. Cole shall fail or neglect to make payment of said sum of $2,000.00 and interest within the time above provided, then the same shall be and hereby is decreed to be a lien upon the following-described real estate, to wit: Beginning at a stone 1320 feet West of the Northeast corner of Section 2, Township 1 South of Range 3 East of the Willamette Meridian; thence South 1870.5 feet to a stone; thence South 324.7 feet to a stone; thence West 1442.8 feet to an iron pipe; thence North 2190.9 feet to an iron pipe on Base Line; thence East 1869.6 feet along Base Line to the place of beginning, containing 91.8 acres, situate and being in the County of Multnomah, State of Oregon, and said lien is hereby decreed to be subject only to the lien of said mortgage for $10,000.00 and interest, said sum of $147.80 and interest, and to the contract rights of the defendants William Hull, Cedric McIntyre, P. Beckler, H. E. Werner, E. W. Moore and A. A. Graham, and

"It is further ordered, adjudged and decreed that if the said Emma A. Smith and Mary J. Cole shall fail or neglect to pay said $2,000.00 and interest within the time provided in this decree then the plaintiff may be, and shall be entitled to a decree, foreclosing said lien for $2,000.00 and interest, and that the said sum shall be paid to the plaintiff out of the proceeds of the sale of said premises after the payment of the $10,000.00 mortgage and the taxes aforesaid. * *

"10. That the plaintiff have and recover judgment against the defendants Emma A. Smith, Mary J. Cole and Chester Cole for the sum of $10,000.00 with interest thereon at eight per cent from the 7th day of December, 1910, and for the further sum of $147.00 for taxes with interest thereon from the 15th day of June, 1912, and that the mortgage made by said Emma A. Smith, Mary J. Cole and Chester Cole to Lucy A. Lumsden be foreclosed, and that the premises described in said mortgage, to wit: Beginning at a stone 1320 feet West of the Northeast corner of Section 2, Township 1 South of Range 3 East of the Willamette Meridian; thence South 1870.5 feet to a stone; thence West 455 feet to a stone; thence West 1442.8 feet to an iron pipe; thence North 2190.9 feet to an iron pipe on Base Line; thence East 1869.6 feet along Base Line to the place of beginning, containing 91.8 acres, situate and being in the County of Multnomah, State of Oregon, be sold to satisfy the said sum of $10,000.00 and $147.80 with interest, as aforesaid, and

"It is further ordered, adjudged and decreed that the plaintiff is not entitled to issue execution upon this decree until after the expiration of fifty days from the date of this decree, the same being the number of days fixed within which said Emma A. Smith and Mary J. Cole shall pay to the plaintiff said sum of $2,000.00 with interest from June 18, 1912.

"12. It is further ordered and decreed, that plaintiff do not recover costs or disbursements of or from defendants or any of them, and that defendants and cross-complainants do not recover costs and disbursements from plaintiff or defendant Edith Richardson,

and that no costs or disbursements be awarded to any party to this suit."

Thereafter, on October 6, 1915, these plaintiffs, who were defendants in the foreclosure proceedings, began this suit by filing their complaint in which it is alleged that in December, 1910, they mortgaged certain real property which is described, to Lucy A. Lumsden, to secure the payment of a promissory note for the sum of $10,000; that the equity and interest of plaintiffs in the property was and is worth $18,000 over and above all encumbrances and adverse claims thereto. It is then alleged that in the month of February, 1912, plaintiffs employed the defendants to secure for them a new loan of $15,000 in order to pay off the Lumsden debt; that defendants accepted the employment, and undertook, as the agents and attorneys of plaintiffs to attend to the matter and to charge a reasonable price for their services; that thereafter, between February, 1912, and June 18, 1912, defendants conspired together to cheat and defraud plaintiffs, by purchasing the Lumsden mortgage for their own benefit and foreclosing it, and pretending that the foreclosure was a step in the process of negotiating the new loan of $15,000, and by preventing a redemption from foreclosure sale, secure a sheriff's deed and dispose of the same for their own benefit; that on July 15, 1912, in violation of their duty as attorneys and agents of plaintiffs, they purchased the Lumsden note and mortgage, without informing plaintiffs of such action, and never informed plaintiffs that they were the owners thereof, or had any interest therein adverse to plaintiffs; that on June 15, 1912, they informed plaintiffs that it was necessary for plaintiffs to convey their title and interest in the premises to some one person for the purpose of clearing the title and that their rights

would thereby be protected and it would render it possible to negotiate the new loan; that relying upon such representations, they conveyed the premises to Edith King, now Edith Richardson, wife of defendant Wm. P. Richardson; that at or about the time of said conveyances, and the purchase of the Lumsden mortgage by defendants, the latter began a suit to foreclose such mortgage, and on July 18, 1912, plaintiffs were served with summons and complaint therein, at the office of defendants, who at that time represented to them that the foreclosure was merely a matter of form which was necessary in order to procure the new loan, and at the same time paid to plaintiffs the sum of $2,000, representing that it was a part of the new loan and that the remainder of such loan would be accounted for to plaintiffs after paying off the Lumsden mortgage, taxes, interest, and expenses. It is then averred that all of these representations were false and fraudulent, in that it was not necessary to the negotiation of a new loan that the conveyances mentioned should have been made, and the foreclosure of the mortgage was not begun in order to clear the title, or to assist in making a new loan, but that such foreclosure was had as a part of the conspiracy to secure plaintiffs' equity in the property. These allegations are followed by the further averments that in the foreclosure suit it was found and adjudged that the defendants were acting as attorneys for the plaintiffs at the time of the purchase of the mortgage and the institution of the foreclosure suit, and that defendants acted in bad faith toward plaintiffs therein, and it was adjudged that on account of defendants' fraud and deception they were not entitled to recover attorney's fees or costs, but that they were entitled to recover the actual amount expended

by them in the purchase of the mortgage, together with the $2,000 advanced by them to the plaintiffs.

The findings of fact, conclusions of law, decree, and the answer and cross-complaint in the foreclosure proceeding are attached to the complaint herein and made a part thereof. After the above-mentioned recitals we find the following allegations:

"That after the entry of said decree and during the period of redemption, the plaintiffs undertook to redeem said premises from said foreclosure sale, and for that purpose procured a number of persons who were ready, able and willing to redeem said premises and furnish the necessary money to the plaintiffs to make said redemption and the plaintiffs would have made said redemption and could have made said redemption but were prevented from so doing by the repeated and continued misrepresentations and deceit of the defendants, pursuant to said plan of the defendants hereinbefore referred to, which misrepresentations and deceit on the part of the defendants are as follows:

"That the defendants falsely, during said period of redemption, stated to these plaintiffs and to other persons hereinafter named and to other persons not hereinafter named, whose names are to these plaintiffs unknown but as plaintiffs have been informed and believe, to wit: That said premises were involved in litigation, and that said premises were not worth more than was due to the defendants; that a redemption could not safely be made because other persons besides these plaintiffs claimed to be the owners of certain equities and interests which it was impossible to determine; that the title was involved in doubt and uncertainty; that the reputation of the defendants had been injured in said foreclosure suit and the defendants would not permit the plaintiffs to redeem said premises without paying a large amount of money by way of damages to the defendants in addition to the money required to redeem said premises, and if a redemption were attempted to be made by the plaintiffs the defendants

threatened to appeal or to involve said title and said premises in further litigation so that no redemption could be made; that the defendants had procured all the rights and title of plaintiffs and had settled with the defendants and there was no redemption to be made; which said statements were false and were made fraudulently by the defendants, but were believed by the persons to whom they were made and the defendants thereby dissuaded said persons from furnishing the money with which to redeem and prevented these plaintiffs from making said redemption.

"That said misrepresentations were made to these plaintiffs and to Dorr E. Keasey, E. E. Moore, William Hull, J. G. Hamilton, E. A. Lundberg, L. E. Palmer, a Mr. Thomas, a Mr. Cleveland, and a Mr. Young, whose full names are unknown to plaintiffs, and to others whose names are not known to plaintiffs; some of said false statements being made to some of said persons and others to others of said persons.

"That said misrepresentations were made orally at the office of the defendants in the Board of Trade Building in Portland, Oregon, so far as plaintiffs are now informed, at various days and times between the date of said decree and April 9, 1914. Said misrepresentations were made in the presence of these plaintiffs and of the persons above named, and to others not known by plaintiffs."

There are also recitals of the issuance of the sheriff's deed, the subsequent transfer of title to one Reid, a demand for the payment of $18,000, as the excess value of the property over the amount of defendants' interest therein, followed by a prayer for an accounting. To this complaint defendants filed a demurrer upon these grounds:

"1. That said complaint does not state facts sufficient to constitute a cause of suit.

"2. That the court is a court of equity and has no jurisdiction of the subject matter thereof.

"3. That there is an improper joinder of causes in that there is an attempt to allege on the one hand a

cause of suit, and upon the other hand a cause of action for alleged slander of title."

This demurrer was overruled, and defendants answered denying all of the allegations of fraud and deceit and alleging affirmatively that prior to any transactions between plaintiffs and defendants, plaintiffs had disposed of a great many lots or parcels of the land under contracts of sale, and upon deferred or installment payments, the rights under which were subordinate to the Lumsden mortgage, but paramount to plaintiffs' rights; that the equity of the plaintiffs at that time had small market value and they were eager to sell it for $2,000, and that it was then distinctly understood that defendants' payment of $2,000 for the legal title was dependent upon their securing and foreclosing the Lumsden mortgage, since in no other way could a valid and valuable title be obtained. The proceedings in the foreclosure suit are admitted as alleged in the complaint. The answer concludes as follows:

"In this connection these defendants further aver and allege, that the decision of the court in said cause was announced October 28th, 1912; that for the purpose of giving the plaintiffs in said suit every opportunity to make redemption of the premises from the foreclosure sale adjudged by the decree aforesaid, the Findings of Fact and Conclusions of Law, and the decree in said foreclosure suit was not signed and entered until January 3d, 1913; and by the terms of said decree executed thereon was stayed for a period of 50 days after the entry thereof. The decree not having been satisfied by the plaintiffs in this suit prior to the time fixed when execution might issue, execution was duly issued upon said decree, and under and by virtue of said decree, and the execution issued thereon, and on or about the 31st day of March, 1913, the said premises were duly and regularly sold, to satisfy the amount due upon the aforesaid mortgage, interest and costs, and conformably to the requirements of said decree;

and the said sale having been duly reported to the Court, on or about April 8th, 1913, the said foreclosure sale was duly and regularly confirmed by the court; that a sheriff's certificate of sale was duly and regularly issued; that the defendants became the purchasers of said foreclosure sale as by law, and the said decree, they were authorized so to do. That no redemption was made by the plaintiffs, or by anyone in their behalf, and no offer, effort or attempt to redeem was made by the plaintiffs, or anyone in their behalf, so far as these defendants were ever advised; that the period allowed by law for redemption having expired, a sheriff's deed, as by law provided, was issued to these defendants."

A reply having been filed, a trial was had, resulting in a decree for defendants, from which plaintiffs appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Frederic H. Whitfield.*

For respondents there was a brief over the names of *Mr. M. H. Clark, Mr. A. E. Clark* and *Mr. C. A. Johns,* with an oral argument by *Mr. M. H. Clark.*

BENSON, J.—1. We are clearly of the opinion that the demurrer to the complaint should have been sustained. A comparison of the complaint herein with the cross-complaint of these plaintiffs as defendants in the foreclosure suit, discloses at a glance that the facts upon which they relied in the former proceeding are practically identical with those upon which they base their claim for relief herein. The former case was a suit in equity, wherein they called upon the court to make a decree in which should be adjudicated between themselves and the defendants, all of the questions and controversies growing out of the same trans-

actions which they now set out in their initial pleading. At the conclusion of the trial of that contest, they, by their counsel, moved the court for the decree which they obtained. That decree establishes the ownership in the defendant Richardson of the Lumsden mortgage, not as a trustee for these plaintiffs, but as the absolute owner. It further determines his right to a repayment of the $2,000 which he had paid to plaintiffs, and also awards him the process of the court for the collection of these claims by ordering an execution and sale thereon.

Not a single act is alleged as occurring after the trial of the foreclosure suit, except the alleged conduct of the defendants in slandering the title to the real property, and thereby preventing a redemption. As to this phase of the case it may be said that the plaintiffs expressly disclaim any effort or intent to proceed herein as for slander of title, and if it were otherwise, the allegations in relation thereto are wholly insufficient to justify any recovery upon that theory.

2. The law is well settled that a judgment or decree rendered upon the merits is a bar to a subsequent action or suit between the same parties upon the same claim, as to every matter that was or might have been litigated in the action in which it was obtained: *Colgan* v. *Farmers & Mechanics' Bank,* 69 Or. 357 (138 Pac. 1070), and cases there cited.

Appellant urges the consideration of many authorities upon the subject of an attorney's duty to employ the utmost good faith in his dealings with a client's property, but that subject is not before us.

We have read the evidence in this case with great care, but see no necessity for discussing it, further than to say that if the testimony of the plaintiffs themselves, in cross-examination, had been before the court

in the trial of the foreclosure suit, it could never have found that defendants had been guilty of any bad faith.

The decree of the lower court is affirmed.

AFFIRMED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Former opinion sustained December 17, 1918.

ON PETITION FOR REHEARING.

(176 Pac. 793.)

Former opinion sustained on petition for rehearing. Rehearing denied.

Mr. Frederic H. Whitfield, for the petition.

Mr. A. E. Clark and *Mr. M. H. Clark,* opposed.

BURNETT, J.—Careful consideration has been given to the petition for rehearing filed by the plaintiffs attacking an opinion written by Mr. Justice BENSON affirming the decree of the Circuit Court in this suit. It will be recalled that originally the plaintiffs were the owners of a tract of land in Multnomah County which they platted into smaller subdivisions, and for the purpose of more expeditiously marketing the lots, conveyed the whole property to a trust company with power to execute and deliver contracts and deeds to purchasers. All this property was subject to a prior mortgage of $10,000 held by Lucy A. Lumsden. Sundry contracts for sale had been issued and partial payments made thereon, which the plaintiffs received to their own use. The defendant Richardson acquired

the Lumsden mortgage by purchase and proceeded to foreclose the same. Defending against that suit, the plaintiffs here narrated the history of their property substantially as already stated, and averred that they had applied to the defendant Richardson and his partner as attorneys to negotiate for them a loan of $15,000 with which to take up the mortgage in suit; that the attorneys conspired to cheat and defraud the present plaintiffs, the then defendants, out of their property and to that end stated to them it would be necessary for them to cause the trust company to convey to some designated person the title to the property; that the then defendants, plaintiffs here, should also convey their interest and that it would be requisite also to foreclose the mortgage. Agreeing to this under the influence of those representations, the plaintiffs here made such conveyance to a designated grantee, Edith King, upon payment to them of $2,000, which the attorneys, as the present plaintiffs claim, said was part of the loan of $15,000 then being negotiated. The defendants here denied the confidential relation and claimed that the present plaintiffs sold to them their equity of redemption in the property for the sum of $2,000. That foreclosure case was heard and the trial court made findings of fact substantially as the defendants had answered. Thereafter a decree was entered setting aside the deeds mentioned and decreeing the present plaintiffs to be the absolute owners of the land, subject, however, to the $10,000 mortgage and to the repayment by the plaintiffs herein of the $2,000 they had received. These sums with interest were impressed upon the land as liens, with the usual foreclosure order providing for a sale to enforce the same in default of payment. The findings of fact and conclusions of law were filed October 28, 1912, but entry of the decree

was postponed to January 3, 1913, and its terms stayed the issue of execution for fifty days thereafter. The land was sold under execution issued on the decree March 31, 1913, no attempt having been made to pay the amounts impressed upon the property as liens in favor of the attorneys, and the sale was confirmed April 8, 1913. No redemption having been made, the sheriff's deed was executed, delivered and recorded April 9, 1914.

The present complaint, after reciting all of these matters, avers:

"That the defendants falsely, during said period of redemption, stated to these plaintiffs and to other persons hereinafter named and to other persons not hereinafter named, whose names are to these plaintiffs unknown but as plaintiffs have been informed and believe, to wit: That said premises were not worth more than was due to the defendants; that a redemption could not safely be made because other persons besides these plaintiffs claimed to be the owners of certain equities and interests which it was impossible to determine; that the title was involved in doubt and uncertainty; that the reputation of the defendants had been injured in said foreclosure suit and the defendants would not permit the plaintiffs to redeem said premises without paying a large amount of money by way of damages to the defendants in addition to the money required to redeem said premises, and if a redemption were attempted to be made by the plaintiffs the defendants threatened to appeal or to involve said title and said premises in further litigation so that no redemption could be made; that the defendants had procured all the rights and title of plaintiffs and had settled with the defendants (plaintiffs) and there was no redemption to be made; which said statements were false and were made fraudulently by the defendants but were believed by the persons to whom they were made and the defendants thereby dissuaded said persons from furnishing the money with which to redeem

and prevented these plaintiffs from making said redemption."

It is further charged in the complaint that after procuring the sheriff's deed, the defendants sold the realty to another party, thus depriving the plaintiffs of their property and its value in the sum of $18,000. They pray for an accounting for the profits realized by the defendant attorneys.

3, 4. In passing, it may well be doubted whether the allegations of fraud are sufficient upon which to base a suit. In a certain sense, the premises were indeed involved in litigation. They had been sold and the time for redeeming from the sale had not expired, and disputes about the redemption were liable to arise in that very proceeding. That the premises were not worth more than was due the defendants was a matter of opinion, which has constantly been held not to be fraudulent. Besides, the accuracy of that opinion had been demonstrated by the test of the sheriff's sale. It is plain that one redeeming the property would succeed to the estate of the plaintiffs, encumbered by their responsibility for the contracts which had been issued for the sale of the smaller tracts. This of itself would involve the title in doubt and uncertainty. The averment about the damage to the reputation of defendants and of not permitting a redemption of the premises without paying damages in addition to the money required to redeem the premises, was a mere threat or bluff. It does not amount to a representation of fact. The same may be said of their threat to appeal or to involve the title in further litigation. That the defendants had procured all of the rights and title of plaintiffs was a mere opinion as to the effect of the decree in the foreclosure suit and the sale in pursuance thereof.

5. Ignoring this, however, we again have carefully read all of the testimony in our quest for the merits of the case. The plaintiff Mrs. Smith testifies that she interviewed the defendant Richardson only and him but twice. The first time was in company with her agent and attorney in fact, one Ruddy, in January, 1914, during the fifty days' stay of execution, when no one could know who would be the purchaser. We remember also the averment of the complaint that the alleged fraudulent statements were made during the period allowed for redemption, viz., after the sale. The next time was on April 10, 1914. She is very definite and positive in fixing this date, because as she says it was her mother's birthday, and she claims that at that time the defendant made some such representations as she sets forth in her complaint. This could not have influenced the case, because the representations were made the day after the issuance of the sheriff's deed; in other words, after the time for redemption had expired. She says that the only individuals she had a chance to obtain money from with which to redeem were three different men: Cronan, Griffin and Palmer; yet the testimony fails to show that either of these men, or she for them, ever offered to redeem or approached the defendants in any manner whatever. She frankly said as a witness that she had no money and offered none. She further testified that within three or four days after she and her coplaintiff had executed the King deed and had received the $2,000, the defendant Richardson called her by telephone, and told her he had heard she was dissatisfied and that if she would return the money he would gladly give back the deed. Meanwhile, however, the plaintiffs had given part of the money to Ruddy and could not return it.

It seems that one Moore was one of the parties who had contracted to purchase part of the land prior to the foreclosure suit. During the period of redemption and against the protests of Richardson, Moore had built a house on the tract, thinking that probably it would be redeemed and he would have an opportunity to complete his purchase. Some of his friends, members of a fraternal order, thinking that he had acted unwisely and was in danger of losing not only what he had invested and which was foreclosed by the decree to which he was a party, but also his building, formed themselves into a voluntary committee and went to interview the defendants to persuade them to allow Moore to pay up the balance due on the contract and take conveyance from them of his tract prior to redemption. One of these parties was a man named Hamilton, who appeared as a witness for the plaintiffs. He says he had but one interview with the defendants and that only at the time the committee visited them. He narrated substantially that Richardson declined to do anything for Moore during the redemption period. Whereupon Hamilton said, "Then we will redeem." Richardson asked him how much it would require for that purpose and Hamilton informed him that as he had computed it from the record it was in the neighborhood of $13,600. Whereupon Richardson said it would take $3,000 or $4,000 more for money which he had advanced to the plaintiffs. Richardson flatly denies all this testimony of Hamilton. It appears in evidence that Hamilton had taken an option from the plaintiffs to buy the property and to redeem it, paying to them at the time and afterward certain amounts specified. His testimony is weakened considerably by the fact that his contract, introduced by the plaintiffs as one of the exhibits, contains his own recital that it would require $16,000 to effect redemption. It is fur-

ther weakened by the testimony of the other members of the committee, who were present at the time, not one of whom says that Richardson demanded more for redemption than the amount provided by the statute. More than all that, the amount required for redemption was a matter of record and no one had the right to act upon or be deterred from redemption by any such language of Richardson even if he used it. The witness Keasey, one of the committee, declares Richardson said he did not want to sell and did not think the title could be delivered without foreclosure to wipe out the contract claimants. The witness Lundberg, in substance, testified that the defendants would not sell to Moore the three acres during the redemption period. Another member of the committee, Mr. Deitz, said Richardson declared he could not do anything until the time for redemption had expired. George Thomas, another man who went there in Moore's interest, said that Richardson claimed the defendants were not in possession or in position to say what they would do, but did not encourage the committee to think they would sell three acres to Moore, as it might interfere with a future sale. The defendants as witnesses in their own behalf explicitly deny making any statement derogatory to the title.

On the merits of the present complaint and on the theory that it states a cause of suit, the testimony does not sustain the allegations of the complaint. The defendants simply stood on their legal rights as purchasers at the execution sale under the decree in the foreclosure suit. The rights of the plaintiffs as redemptioners were fixed by the statute as it then stood. Section 248, L. O. L.:

"The judgment debtor, or his successor in interest, may, at any time prior to confirmation of sale, and also within one year after the confirmation of sale, redeem

the property on paying the amount of the purchase money, with interest thereon at the rate of ten per centum per annum from the date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon."

The plaintiffs and the defendants were concluded by the decree in the foreclosure suit. All the former had to do was to pay the decree, for which a respite of fifty days was given them not counting the interval between the announcement of the decision and the entry of the decree. Afterward and until a year beyond confirmation of sale they could have given notice to the purchasers of their intention to redeem, and paid the required amount to the sheriff who made the sale, despite anything the defendants said.

The true state of the affair on the facts, as we think, is succinctly narrated in the testimony of George Thomas:

"Then I took the matter up with Mr. Manley and we went over to Boothe and Richardson's office, talked the matter over with them and asked them if they had a deed, and they delivered the abstract to me and Mr. Manley examined it very thoroughly and came to the conclusion on account of the contracts that had been made that it would not pay us to go into the matter. The agreement was that if we did redeem we were to have the original owners' equity in consideration of twenty-five hundred dollars, and we came to the conclusion that it would not be good business, and we turned it down."

He says that occurred possibly thirty days before the expiration of the redemption period and after the visit of the committee, and he repeats thus:

"After investigating it we came to the conclusion that it wasn't worth it, and on account of the contracts there and possible trouble we would get into; in other words, A. B. Manley's words were, 'Well, we are right in the same shoes those ladies are now, if we take it.'"

6, 7. Counsel for plaintiffs has cited a wealth of authority on the well-known principle that an attorney or other person occupying a fiduciary relation to another and employed to defend title to real property cannot go out and buy in his own interest an adverse title, without having imputed to him a trust in favor of his client. The Circuit Court in rendering the decree of foreclosure applied these principles in favor of the plaintiffs, not only declaring the trust, but also executing it by setting aside the deeds procured by the defendant attorneys and declaring the present plaintiffs to be the absolute owners of the property, subject, of course, to the lien of the mortgage which they had themselves contracted to pay, and to the lien of the $2,000 which they admitted they had received from the defendants. Thus they were fully restored to their own. The confidential relation and its abuse had been worked out to final solution and merged in the decree. This answers counsel's Socratic argument:

"If the question of duty of attorneys to client is not in this case, when did it drop out?"

The relation alluded to was considered adjudicated and terminated by the decree. That determination of the court in ordering a conveyance to plaintiffs of the King interest and that derived from the Trust Company gave back to the plaintiffs all that they ever parted with to anyone by reason of the alleged fraud. Its consequences were wiped out. There was thereafter no trust relation between them and their former attorneys, the present defendants. Thenceforward they dealt not in a confidential relation but at arm's-length, if not at swords' points. The plaintiffs had ample opportunity to do equity by paying the amount they justly and admittedly owed for the money they had received from the defendants and upon the mort-

gage. That the attorneys could buy the mortgage is taught by *McKenna* v. *Van Blarcom,* 109 Wis. 271 (85 N. W. 322, 83 Am. St. Rep. 895). This was not inequitable, because it would cost the plaintiffs no more to pay to the attorneys than it would to the original creditor. The authorities cited by the plaintiffs would have been applicable if the attorneys had bought the Lumsden mortgage at a discount and had undertaken to charge their clients for the full face of it. No showing of such a condition exists. In brief, the decree in foreclosure settled the rights of the parties and gave ample opportunity to the plaintiffs to perform their part of it. They did not perform, and the defendants had the right as antagonistic parties, and not standing in any confidential relation to the plaintiffs, to collect their money in the ordinary process of the law. The testimony fails to show that they did anything during the redemption period to prejudice the right of redemption. They violated no confidence in asserting the right the decree gave them. The plaintiffs have failed to do the equity required of them and must take the consequences which the plain letter of the statute visits upon a judgment debtor who does not pay.

The counsel for the plaintiffs murmurs in the petition for rehearing to the effect that when the latter applied for a new loan they had an equity in the land worth $18,000 and when the proceedings terminated they had only $2,000 and the defendants had the land. The fallacy of this argument lies in the assumption that the residue of the estate of the plaintiffs was of that value. It is true the Circuit Court signed a finding of fact to that effect in the foreclosure suit. Instead, however, of impressing a lien upon the land in favor of these plaintiffs and against the present defendants for that amount, the trial court returned to the plaintiffs here the land itself and gave a lien to the

other parties for the amount of their claims. Whatever the value was, therefore, the plaintiffs had it all. In judicial proceedings the ultimate test of values is a fairly conducted sale under process of court. Judged by that standard, the assumption of a value of $18,000 is refuted in the present juncture and the argument fails.

It is a matter of regret that the plaintiffs were not able to pay their debts and, as often happens, have lost their property; but the record shows nothing to avert that result. We adhere to the former opinion.

REHEARING DENIED.

Argued at Pendleton October 29, affirmed December 17, 1918.

ALDER SLOPE DITCH CO. *v.* MOONSHINE DITCH CO.

(176 Pac. 593.)

Corporations—Classes—"De Jure Corporations"—"De Facto Corporations."

1. As to ability to transact business, corporations may be divided into "*de jure* corporations," with organization entirely and legally perfected, "*de facto* corporations," where there has been a *bona fide* attempt to organize, and a user of corporate powers, with a defective organization, and corporations not sufficiently organized, to come within the latter class.

Waters and Watercourses—Irrigation—De Facto Corporations—What Constitutes.

2. A ditch company, a *bona fide* attempt to organize which has been made under an existing law, which has actually used its corporate powers by appointing a secretary and filing notices to initiate water rights, is a *de facto* corporation.

Waters and Watercourses — Irrigation Company — Acts of Officers—Ratification.

3. Where a *de facto* ditch company followed a notice to initiate a water right given by its secretary, by construction of an irrigation system and user of water therein, the act of the secretary was ratified, even if merely that of a promoter.

Corporations—De Facto Corporations—Collateral Attack.

4. The legality of a corporation *de facto* cannot be inquired into collaterally unless on attack by the state.

[As to what constitutes a *de facto* corporation, see note in 118 **Am. St. Rep.** 253.]

From Wallowa: JOHN W. KNOWLES, Judge.

In Banc.

This is a contest over water rights in connection with the adjudication of the waters of Hurricane Creek, a tributary of the Wallowa River. The facts are in the main stipulated between the parties. On the 28th of November, 1901, three persons met for the purpose of organizing the Moonshine Ditch Company as a corporation. On said day they signed articles of incorporation in triplicate, established their main office and filed a copy of said articles with the county clerk of Wallowa County on the twenty-ninth day of November, 1901, and another copy of the articles in the office of the secretary of the corporation at Joseph, and forwarded the third set of the articles to the Secretary of State at Salem. These articles were not officially filed at Salem until the fourth day of December, 1901. On November 28, 1901, the incorporators appointed G. L. Cole, one of their number, as secretary and agent of the company, and on the morning of November 30, 1901, at 8 o'clock A. M. said secretary caused a notice to be posted on Hurricane Creek for and on behalf of The Moonshine Ditch Company for the purpose of initiating an appropriation of the water from said creek; that after the fourth day of December, 1901, said corporation was fully organized, and on May 5, 1902, commenced the construction of a ditch and diverted the water of Hurricane Creek and put the same to use. On November 25, 1901, The Alder Slope Ditch Company was a fully organized corporation, and on November 30, 1901, at 4 o'clock P. M. said corporation

posted a notice on Hurricane Creek to initiate a water right thereon, and during the spring of 1902 said Alder Slope Ditch Company constructed a ditch and made a beneficial use of the water of said Hurricane Creek. Both corporations file their claims before the State Water Board in order to determine the priority and amount they were entitled to. The water board determined The Moonshine Ditch Company was entitled to priority over the Alder Slope Ditch Company. The latter company procured an appeal to the Circuit Court of Wallowa County and the determination of the state water board was affirmed, from which decree plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. James A. Burleigh.*

For respondent there was a brief and an oral argument by *Mr. A. W. Schaupp.*

OLSON, J.—1. There is but a single point to be decided in this case, viz.: Was the Moonshine Ditch Company sufficiently organized at 8 o'clock on November 30, 1901, to initiate a water right? As to ability to transact business, corporations may be divided into three classes. First, *de jure* corporations, or those where the organization is entirely and legally perfected. Second, *de facto* corporations where there has been a *bona fide* attempt to organize a corporation and a user of corporate powers, but the organization is defective. Third, corporations not sufficiently organized to come within the latter class.

2–4. It is apparent from the statement of facts that the Moonshine Ditch Company falls in the class of *de facto* corporations and within the rule laid down in *Splonskofsky* v. *Minto,* 62 Or. 560 (126 Pac. 15). We

have clearly in this case a law under which the corporation could be organized, a *bona fide* attempt to organize a corporation, and an actual use of corporate powers. It was an act of using corporate powers to appoint G. W. Cole as secretary and agent of the corporation. The filing of a notice to initiate a water right, which was made in the name of the corporation, is a user of corporate powers. The act of G. W. Cole as secretary and agent in the making and filing of the notice in the name of the corporation, even if considered as the act of a promoter, was ratified by the corporation by following up said notice by the construction of an irrigation system and user of water therein, and their claim before the water board on the water rights so initiated. The act has been plainly ratified: *Schreyer* v. *Turner Flouring Mills,* 29 Or. 1 (43 Pac. 719). Having established the Moonshine Ditch Company as a corporation *de facto* it is a settled law in this state that the legality of its existence cannot be inquired into collaterally. A direct attack may be made by the state, and in certain circumstances a direct attack may be made by individuals, but no collateral attack as attempted in this case will lie: *Marsters* v. *Umpqua Oil Co.,* 49 Or. 374 (90 Pac. 151, 12 L. R. A. (N. S.) 825); *Leavengood* v. *McGee,* 50 Or. 233 (91 Pac. 453); *Brown* v. *Webb,* 60 Or. 526 (120 Pac. 387).

The above cases definitely settle the law of the State of Oregon to the effect that a corporation *de facto* cannot be collaterally attacked as to the regularity of its organization by any party other than the State of Oregon. The lower court is affirmed. AFFIRMED.

HARRIS, J., absent.

Argued October 18, reversed and suit dismissed December 17, 1918.

GORSLINE *v.* GORE.

(176 Pac. 603.)

Compromise and Settlement—Giving Note as Prima Facie Evidence.

1. The giving of a promissory note is *prima facie* evidence of an accounting and settlement by the parties of all demands between them up to the date of the execution of the note.

Compromise and Settlement—Presumption of Correctness.

2. The presumption is in favor of the correctness of a settlement of accounts between parties, and that a note given for the balance ascertained expresses the truth, so that the account will be opened only upon clear and satisfactory proof of error or mistake.

Compromise and Settlement — Reopening Accounts — Error and Mistake—Evidence.

3. In a suit by a brother to reopen an account between his sister and their deceased father which had been settled by agreement and the sister's note for balance due given, and later paid in full, evidence of errors and mistakes involving duplicate receipts *held* not sufficiently clear and satisfactory.

[As to compromise and settlement and when enforceable on payment of part of the demand, see notes in 100 **Am. St. Rep.** 412, 429.]

From Marion: WILLIAM GALLOWAY, Judge.

Department 1.

This is a suit for an accounting brought by D. D. Gorsline as executor of the estate of W. M. Gorsline, deceased, against Jennie A. Gore. W. M. Gorsline and Catherine Gorsline were husband and wife and resided in Marion County, Oregon. D. D. Gorsline, Jennie A. Gore and Mrs. Illedge are children of W. M. and Catherine Gorsline. It may be inferred from the record that Mrs. Smith and Mrs. Beardsley are also the children of W. M. and Catherine Gorsline, although the record contains no unequivocal evidence to that effect. Catherine Gorsline died on October 12, 1912, and her husband, W. M. Gorsline, died on May 15, 1915. Jennie A. Gore has resided in or near Kalama, Wash-

ington, for about 25 years. During the period commencing with November, 1907, and ending with January, 1912, the defendant received moneys from her parents to be invested for them in county warrants and mortgages.

In response to a letter from her father saying, "I am sick. I want you to come," the defendant went from Kalama to her father's home; and on February 7, 1913, probably the next day after her arrival, she had an accounting and settlement with her father. After accounting for the debits and credits it was agreed between the defendant and her father that she was indebted to him for a balance of $826.31; that she gave to her father a promissory note dated February 7, 1913, for the sum of $826.31. Since giving the note the defendant has paid the note in full.

The complaint alleges that moneys, in amounts unknown to the plaintiff, were delivered to the defendant to be loaned for W. M. Gorsline and that the defendant owes the estate a large sum, the exact amount of which is unknown to the plaintiff; and the executor therefore prays for an accounting.

The defendant pleads the accounting and settlement which she had with her father on February 7, 1913, alleges that she gave her note to her father for the balance found to be due for her after such settlement, avers that she has since paid the note in full, and says that she is not now indebted to the estate in any sum whatever.

The reply confesses that an accounting and settlement was made on February 7, 1913, but seeks to avoid the effect of the settlement by alleging that the defendant wrongfully represented that she had received from her parents only the sum of $4,500 when in truth she had received $5,500; that W. M. Gorsline, then being

aged about 84 years and having full confidence in the integrity of his daughter, relied upon her statement "and attempted at said time to have an accounting with her upon said basis, and upon such attempted accounting, an amount was found due him as set forth" in the answer. The decree of the trial court was for the plaintiff and the defendant appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. M. J. Gore* and *Mr. Oscar Furuset,* with an oral argument by *Mr. Furuset.*

For respondent there was a brief prepared and presented by *Mr. John H. McNary.*

HARRIS, J.—The defendant argues that the reply is a departure from the complaint. We shall assume, however, without deciding, that the pleadings are sufficient to enable the plaintiff to correct any mistakes that may have been made by the defendant and her father in their settlement; and we shall therefore inquire into the merits of the controversy.

1. It must be remembered that the defendant alleges and the plaintiff admits that there was an accounting and settlement and it must also be borne in mind that the defendant alleges and the plaintiff admits that the defendant gave her promissory note for the balance found to be due from her on such settlement. The giving of a promissory note is *prima facie* evidence of an accounting and settlement between the parties of all demands between them up to the time of the execution of the note; and as said in *Hoyt* v. *Clarkson,* 23 Or. 51, 55 (31 Pac. 198):

"When a settlement of accounts has been deliberately made and a note voluntarily given for an ascer-

tained balance, it will not re-examine such accounts and grant relief except on precise allegations of such errors or mistakes, and clear and satisfactory proof of the same. * * The presumption is in favor of the correctness of the settlement, and that the note given for the balance ascertained on such settlement expresses the truth. Hence, the general rule that a settled account will not be opened on mere conflicting evidence."

See, also, *Matasce* v. *Hughes,* 7 Or. 39, 42 (33 Am. Rep. 696); *Williams* v. *Culver,* 30 Or. 375, 377 (48 Pac. 365); *Casner* v. *Hoskins,* 64 Or. 254, 266 (128 Pac. 841, 130 Pac. 55).

2, 3. D. D. Gorsline and Jennie A. Gore were the only persons who testified as witnesses. Besides W. M. Gorsline and Jennie A. Gore, those present throughout the accounting and settlement were D. D. Gorsline and Mrs. Smith and probably Mrs. Beardsley. Mrs. Smith is dead; but there is no evidence explaining why Mrs. Beardsley did not appear and testify as a witness. The debits charged against the defendant amounted to $4,500 as principal and $1,098.96 as interest, the principal and interest aggregating $5,598.96. The credits allowed the defendant consisted of one item of $89.35 and six other items aggregating $2,683.30, making a total of $2,772.65. Striking a balance between the credits and debits the parties agreed that the defendant was indebted to her father in the sum of $2,826.31. W. M. Gorsline had determined to make an advancement of $2,000 to each of his children; and it was agreed in the settlement that the advancement to be made to the defendant should be paid by crediting it on this balance of $2,826.31, thus leaving a net balance of $826.31 owing from the defendant. After agreeing upon this net balance the defendant signed and delivered to her father a promissory note for $826.31, which she afterward paid in full.

The plaintiff contends that the defendant should be charged with $5,500. The defendant insists that she only received $4,500 from her parents. The plaintiff claims that the defendant should be charged with three one thousand dollar items, while the latter says that she should be charged with only two of such items. A brief statement of what was done in reaching the settlement may afford some aid in our quest of the truth. The defendant had sent receipts to her father for remittances made to her. Among other moneys he had made a remittance of $1,000 for which the defendant had returned a receipt; subsequently he wrote to his daughter saying that he had lost the receipt and requested her to forward a duplicate receipt. On March 31, 1910, she signed and forwarded to her father a duplicate receipt which recites that

"some time in Feb. 1910, I received from W. M. Gorsline $1000.00. Said money used thus: 600.00 in a mortgage, given by Geo. Kalahan & Vina his wife to W. M. Gorsline and the ballance put in Co. Warrants drawing 8 per cent int. the original receipt being mislaid or lost this sum being the only money received by me during Feb. 1910."

This duplicate receipt occupies an important place in the controversy between the litigants. The defendant contends that the duplicate receipt represents an item of $1,000 which was received by her on January 27, 1909, and that the date 1910 appearing in the duplicate receipt was simply the result of a mistake on her part. The plaintiff insists that the defendant should be charged with the amount stated in the duplicate receipt in addition to the several amounts represented by the remaining receipts. Nine receipts, including the duplicate, were produced at the trial. The plaintiff says that his father had only eight receipts when the settlement was made on February 7, 1913. At the time of

the settlement D. D. Gorsline "read off" the receipts; W. M. Gorsline calculated the interest with the aid of an interest book; and the defendant set down the items, the principal of each remittance and the interest due on it, on a sheet of paper. The interest was computed to February 1, 1913. A paper marked Exhibit "C" is undoubtedly the paper used by the defendant on that occasion. The defendant swears that it is the identical paper used by her at that time. The plaintiff does not admit that it is the paper used by his sister, although he does say that "it might possibly be one that they made that day," and he concedes that she "set down the figures" as his "father would give them from the interest book." The authenticity of Exhibit "C" is established beyond question by the testimony of the plaintiff himself; for when speaking of a $500 item he said:

"Well, now, I will tell you, I think there was a mistake in the date of that receipt that day. You see, that is October, but no date, and I think they agreed upon a date. I have November 1st."

The receipt itself reads thus: "Kalama, Oct., 1908," and immediately beneath "Oct., 1908," appears "Nov. 1st, 1908," written with an indelible pencil. Exhibit "C" shows that "Oct—08" was first set down; but "Oct." is marked out and "Nov. 1–08" inserted. The whole of Exhibit "C" is written with an indelible pencil. Two other pieces of paper, which were originally used as envelopes, were used in making the calculations. One of these papers is marked Exhibit "D" and the other Exhibit "E."

The plaintiff testified that immediately after the settlement was agreed upon he made a memorandum of the credits and debits, and when referring to his memorandum he said "that's the figures I taken from

theirs that day." The credits and debits shown upon his memorandum correspond exactly with the credits and debits shown upon Exhibits "C," "D" and "E." In the upper left-hand corner of Exhibit "C" appears a column of figures consisting of eight items, making up the principal sum of $4,500 charged against the defendant. These items are as follows:

"Feb. 1st, 1000; Sept. 19–08, 500; Dec. 06–07, 250; Nov. 16–07, 500; Sept. 20–09, 500; Dec. 4–07, 250; Jan. 26–12, 1000; Nov. 1–08, 500."

The interest was calculated on each of these principal items and the interest due on each respective item was set down in the upper right-hand corner of Exhibit "C." The interest aggregated $1,098.96.

The plaintiff testified that he talked with his father "a good many times" about the settlement and that his father "always claimed that there was more money back." It is significant, however, that the plaintiff admits that there was "no private talk; we was all there together" on the day of the settlement; and the plaintiff also admits that his father agreed to the settlement "and took the note." There is no evidence whatever to indicate that W. M. Gorsline ever claimed to the defendant that any moneys had been omitted from the accounting; and she testified that her father never claimed that any item was omitted from the settlement. The plaintiff testified, however, that his father told him, about two months before his death, "that he had found that other receipt of a thousand dollars"; and that about three days before his death when "telling me some business to look after" his father said, "That other receipt that I found; Delmar, you look after that, too." The plaintiff says that the parties had but eight receipts, including the duplicate, on the day of the accounting; that he retained possession of these eight

receipts and that they were not delivered to the defendant; that "quite a bit" after his father's death he "found that there [the ninth receipt] about the house, going through the papers." When asked to pick out from the nine receipts produced at the trial the one his father did not have on the day of the settlement, D. D. Gorsline specified the receipt dated January 26, 1912. This witness emphasized his testimony by saying, "I read the receipts off, and I know that it [the January 26, 1912, receipt] wasn't there." When asked whether his father knew "anything about that receipt at the time this alleged settlement was made," D. D. Gorsline answered: "I don't think he did." Again, when asked: "Are you quite sure it is this one of January 26, 1912, is this one you didn't have?" This witness responded, "No, I know we didn't have that one;" and even after his attention was directed to the fact that among the debits set down in Exhibit "C" is one item dated January 26, 1912, for $1,000, the witness reiterated his former statements and said that he was "quite positive" that the January 26, 1912, receipt was not among the receipts which the parties had on February 7, 1913. Furthermore, D. D. Gorsline admitted, even after his attention had been called to the January 26, 1912, item appearing in Exhibit "C," that in making the settlement the parties took into account the one thousand dollar item represented by the duplicate receipt and that this duplicate receipt had been in his possession "all the time" since the day of the settlement. In other words, the plaintiff is contending that the defendant should be charged with the principal sum of $5,500 on the theory that when the settlement was had on February 7, 1913, the parties did not have the January 26, 1912, receipt, and that therefore this item of $1,000 was not taken into

account by the parties in making their settlement. As we read and analyze the record, the plaintiff is honestly mistaken in his recollection of some of the facts.

Exhibit "C" contains eight items which make up the principal sum of $4,500 and among these eight items is the one for January 26, 1912, for $1,000. The eight items are set down in a column in the upper left-hand corner of Exhibit "C." Interest was computed at the rate of 7 per cent per annum; and written after each of the eight items is the time for which interest was charged and the amount of interest found to be due on each such item. Interest was computed from the dates of the respective receipts, with the exception of the duplicate receipt. Regardless of whether the parties had the January 26, 1912, receipt with them on the day of the settlement, it incontrovertibly appears that this item for $1,000 was included in the settlement. The significance of the appearance of the January 26, 1912, item is especially emphasized when we remind ourselves that the elimination of this item from the account would necessarily and irremediably change the balance which the parties struck; and in this connection we must remember, too, that the memorandum which D. D. Gorsline made of the debits and credits, agrees with the debits and credits shown on Exhibits "C," "D" and "E." Most of the figures on Exhibit "D" were made with an indelible pencil and appear to have been written by the defendant. A few figures on Exhibit "E" were made with an indelible pencil and appear to have been written by the defendant; but the remaining figures on Exhibit "E" were made with an ordinary lead pencil and were written by D. D. Gorsline or by his father, probably the latter.

Among the nine receipts produced at the trial is one for $1,000 under date of January 27, 1909. This item

does not appear in Exhibit "C"; and, moreover, if this item had been included in the accounting with interest computed at the rate of 7 per cent per annum from January 27, 1909, the balance struck by the parties would have been different from that agreed upon by them, whether all or only a portion of the remaining eight receipts entered into the calculations. D. D. Gorsline is probably correct when he says that the parties had only eight receipts on the day of the settlement; but every sign in the record points to the January 27, 1909, receipt as the one that was missing. The defendant claims that the duplicate receipt was intended as a duplicate for the January 27, 1909, receipt; for she contends that she received remittances of $1,000 twice only, the first on January 27, 1909, and the second on January 26, 1912. There are circumstances which tend to weaken this contention and there is evidence which tends to support it. The duplicate receipt was a part of and was inclosed with a letter dated March 31, 1910. The fact that the duplicate receipt fixes February, 1910, as the time when the money was received, especially when considered in connection with the reference to the Kalahan mortgage, which was probably dated March 5, 1910, are circumstances which tend to dispute the claim of the defendant. Her explanation is that she erroneously wrote 1910 instead of 1909 and in so doing made a mistake which, although not a common one, is liable to be made by any person; and she says too that the moneys had been kept invested in county warrants until the loan was made to Kalahan.

The defendant testified as follows:

"Before we started in with the receipts; when we first began the business, I said to my father, I said, 'You remember the duplicate receipt,' I said, 'I don't

want to pay a thousand dollars twice.' He says, 'I will never make you pay a thousand dollars twice.' "

In further explanation the defendant stated that their conversation occurred before she had looked at the receipts and before she knew that her father "had such a duplicate receipt present"; that her father "said he didn't have it [the original receipt]"; and that "he said he didn't have the two receipts," and "he said he didn't have the original." D. D. Gorsline corroborated the defendant when he testified that:

"There was a conversation there that there might be two receipts out for the same amount of money, but as I read those receipts off she looked at every one of them and acknowledged every receipt before they was figured on."

All agree that the parties had the duplicate receipt on the day of the settlement; but, for the reasons already stated, our conclusion is that the parties did not have with them the receipt dated January 27, 1909, when they had their accounting and settlement. If we now direct attention to Exhibit "C" we shall there find some evidence corroborating the direct testimony of the defendant. The first of the eight items making up the principal sum of $4,500 is written thus: "Feb. 1st, 1000." This undoubtedly refers to the duplicate receipt; for all agree that the duplicate receipt was among the eight receipts which the parties considered on the day of the settlement. Immediately after the item just quoted is the figure "7," signifying that the interest was calculated at the rate of 7 per cent per annum; and immediately after the "7" we find written "3 yrs.," indicating that interest is to be computed for a period of three years. If February, 1910, the date given in the duplicate receipt, is the true date, then the interest period was exactly three years and

the correct amount of interest would have been $210; but we find that the defendant is charged with $240 as interest on the item represented by the duplicate receipt. Neither of the two witnesses was asked to explain about the allowance of $240 as interest on the duplicate receipt, and hence it is not going far afield to infer that, not having the January 27, 1909, receipt with them and not remembering the exact date of the original receipt and at the same time knowing that the defendant had received the money prior to February, 1910, the defendant and her father figured the interest for three years and then added $30 to cover the interest which had accrued during the additional but uncertain period.

If we now apply the rule announced in *Hoyt* v. *Clarkson,* 23 Or. 51, 55 (31 Pac. 198), it is manifest that we are driven to the conclusion that the settlement made by the defendant and her father must remain undisturbed, because the plaintiff has failed to produce "clear and satisfactory proof" of any errors or mistakes. In addition to the circumstances previously narrated it may be of interest to relate that W. M. Gorsline "kept his newspapers and other papers" in a box on the clock shelf. Shortly after the death of W. M. Gorsline, within an hour according to the testimony of the plaintiff and within ten minutes according to the testimony of the defendant, Mrs. Illedge "grabbed up all the papers there was and threw them right in the stove before we could stop her." The defendant testified that "we didn't grab hold of her, for we didn't have time. We told her not to burn them." D. D. Gorsline corroborated the defendant and explained that just as he came into the room he heard the defendant say, "What are you burning them papers for?" Although the evidence does not dis-

close what papers were burned, yet it does appear, without dispute, that Mrs. Illedge burned all the papers, whatever they were, which were in the box. To state the admitted fact of the burning is equivalent to stating the inferences which can be drawn.

It is not without propriety to say, in passing, that on account of the attitude of some of the heirs the executor was obliged to bring this suit in order to shield himself against criticism and for the further purpose of clearing up all doubts about the rights of the estate; and hence it is peculiarly appropriate that the costs and disbursements of this litigation should be charged against the estate.

The decree is reversed and the suit is dismissed.

REVERSED AND DISMISSED.

McBRIDE, C. J., and BENSON and BEAN, JJ., concur.

Argued October 17, reversed and remanded November 12, rehearing denied December 24, 1918.

CHRISTENSEN *v.* LANE COUNTY.

(175 Pac. 845.)

Highways—Order—Opening Road—Collateral Attack.

1. A complaint seeking to remove as a cloud on the title, and to set aside, an order of the County Court opening a road across plaintiff's land, is not a collateral, but a direct, attack upon the order of the County Court.

Highways—Complaint—Sufficiency.

2. Complaint in land owner's action to remove cloud on title and to set aside alleged void order of County Court establishing road over her land *held* to allege sufficiently the lack of jurisdiction of the County Court to make the order.

Highways—Setting Aside Order—Negligence of Party.

3. In action to remove cloud from title and to set aside an order of the County Court establishing a highway across plaintiff's land, allegation that plaintiff, being unfamiliar with road establishment,

relied on what the county judge told her husband as to notice of the proceedings, was a mere confession of negligence, and afforded no ground for setting aside the order establishing the road.

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1.

This is a suit to remove a cloud from the title to certain real estate and to set aside an order of the County Court of Lane County, establishing a county road through plaintiff's land. The complaint, after alleging the ownership and possession, recites, in a general and somewhat indefinite manner, some of the steps taken by the County Court in establishing the highway. The jurisdiction of the inferior tribunal in that proceeding is challenged by the following allegations:

"4. That heretofore and on or about the 1st day of December, 1915, there was filed with the county clerk of said county a pretended petition to the County Court to locate a county road over and across the premises above described and owned by this plaintiff; that there was further filed with the said clerk a pretended notice of said petition, which notice was claimed to contain a copy of the said petition.

"The plaintiff alleges the facts to be that the said notice did not contain or set out therein a true copy of the said petition; and that the said notice purported to contain the names of 12 freeholders; that all of the persons whose names did appear on said notice, as petitioners for said road were not in truth and fact freeholders, and no notice was ever had, filed or presented in said matter containing the names of twelve freeholders as petitioners for said road.

"5. That the affidavit filed with the notice above mentioned and referred to does not and did not show nor allege or describe where all of the pretended notices had been posted; that such affidavits recited that one of said notices was posted 'at postoffice,' but without giving the location or name of the or any postoffice in said county, or in said district, or at all, and without

showing where on said postoffice the said notice had been so posted.

"That in truth and fact there are and were at that time several postoffices within the said road district, where the proposed road is located; that said road district contains an aggregate of about 59 miles of roads and is a large road district.

"That the County Court had no proof of any kind other than the affidavit above mentioned and referred to; and that the County Court neither had nor took any proof of the fact that the persons whose names were subscribed to the pretended notice were freeholders and qualified to petition for said or any road.

"That the affidavit aforesaid was verified before one of the persons whose name appears on the said notice as a petitioner for the location of said road; that while he was a petitioner in said matter and one of the interested parties he did undertake to act as a notary public and did pretend to administer an oath to one of his fellow petitioners in verifying the affidavit aforesaid."

It is then averred that no bond or undertaking was filed and approved prior to the appointment of the viewers; that no survey was ever made of the proposed highway; that the road viewers did not file any report before the first day of the next term of court after their appointment; that thereafter, at its term in April, 1916, the court made an order directing the opening of the road, which contained recitals to the effect that no remonstrance against the opening of the road, and no petition for damages had been filed, and declaring that plaintiff's property had not been damaged by such taking of her land for a road. Then follow these averments:

"That thereafter and on or about the —— day of April, 1916, and during the April, 1916, and during the April term of said court, the county commissioners aforesaid did pretend to make an order declaring a road opened over and across the premises of the plain-

tiff; that the said commissioners did in and by said order state that there was no remonstrance to the opening of such road and that no petition for damages had been had or filed; and did further declare that the property of the plaintiff was not damaged by such taking of her property for a road as aforesaid.

"That the plaintiff did claim damages and did, prior to making the order aforesaid, and while said matter was under consideration make a demand on the defendants for damages on account of the taking of her property for a road.

"That the defendants aforesaid did wholly ignore her said claim and did make a pretended and formal order stating that she did not make such demand; and her said demand is not now in the records of said defendants, and no trace can be had or found of the same, and no record was ever made by the defendants of her said demand, nor of her objection to the taking of her property without compensation.

"That the plaintiff was not familiar with the methods of the defendants in laying out or establishing roads; that she caused her husband to make inquiry of the county judge above mentioned as to what was or would be done in said matter; and that he was informed, and the information was transmitted to her, that she would have notice of any action taken; that she depended and relied upon such information, and did not know for a long time after the above order of the —— day of April, 1918, had been made, that any action had been taken; that no notice was ever given to the plaintiff in said matter that her claim for damages had not been allowed, nor that the defendants intended to take her property without compensation.

"That the plaintiff was misled in said matter and being thus misled she could not appeal from said action because she did not know when said action was had or taken, until a long time thereafter."

Plaintiff then assigns as irreparable injury the following facts:

"That the road which the defendant pretends to have declared as such will take and appropriate a strip

of land 60 feet wide and about one mile in length over and across the land of this plaintiff; that her land is a long and narrow strip of land along a creek and that the road so claimed takes the best part of the land along the creek bottom and cuts it up so as to render the balance hard to utilize on account of the road thus running through it. That it is proposed to establish said road over and across the said premises in such a location as to completely destroy a spring of water near the plaintiff's house; that said spring is of value to her in that it is the only supply available to water fit for domestic use and for household purposes; that the defendants propose to establish said road within 20 feet of the dwelling-house of the plaintiff; that if such road is so established it will constitute a constant menace to the use of the plaintiff's property for a home as aforesaid.

"That the strip of land aforesaid contains and is covered with a heavy growth of timber, valuable and useful for commercial and domestic purposes.

"That if the said road is opened as proposed it will wholly destroy and render useless the spring and water supply above mentioned; and will destroy and appropriate large quantities of timber; that the defendants declare that all of this shall be done without compensation to the plaintiff."

This is followed by allegations in which it is sought to show that the route selected for the road is impracticable and unwise, and that the invalidity of the order of the court does not appear upon the face of the record and that said order is a cloud upon plaintiff's title. The prayer is as follows:

"Wherefore the plaintiff prays for a judgment and decree that plaintiff's title to said property be forever quieted in her as against any claim of the defendants, or either of them, on account of the proceedings aforesaid; that the said proceedings be set aside and held for naught, and that the plaintiff have a judgment for

her costs and disbursements herein incurred, and such other and further relief as may to the court seem just and equitable herein."

To this complaint a demurrer was interposed which was overruled and defendants filed an answer. Thereafter, by leave of court this answer was withdrawn and the demurrer reargued. The demurrer having been sustained, plaintiff declined to plead over, and a decree was entered dismissing the suit. Plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Sjur P. Ness.*

For respondents there was a brief and an oral argument by *Mr. L. L. Ray,* District Attorney.

BENSON, J.—The arguments of counsel are largely directed to a discussion of whether this is a direct or a collateral attack upon the proceedings of the County Court. There is probably no legal problem which presents so many confusing efforts by the authorities to elucidate and simplify the questions presented under the conditions of the case at bar, we think the rule is fairly stated by an eminent authority thus:

"In fact the writer is of the opinion (though not conceded by many courts) that any attack which has for its object the setting aside and vacating of a judgment is a direct attack, whether in the same or an independent proceedings. Any attack the object and purpose of which is to avoid the judgment, leaving it to stand as the judgment of the court which pronounced it, is a collateral attack. Thus an action in equity to vacate and set aside a judgment is a direct attack; it directly attacks the judgment. An action to restrain proceedings under the judgment, or to prevent the enforcement thereof is a collateral attack": 1 Bailey on Jurisdiction, 140.

1. Tested thus, the complaint which we are considering is a direct attack. But as we view the matter, the nature of the attack is of small importance in any event. The complaint alleges that "no notice was ever had, filed or presented containing the names of twelve freeholders as petitioners for said road," and "that the County Court neither had nor took any proof that the persons whose names were subscribed to the pretended notice were freeholders and qualified to petition for said or any road."

2. The County Court acquires jurisdiction in proceedings to establish highways by means of a petition signed by at least twelve freeholders residing in the road district where the road is to be laid out: Section 6279, L. O. L. This must be followed by posting a notice of such petition at the place of holding County Court, and in three public places in the vicinity of the road, and satisfactory proof of such posting. This court has further held that such notices must be signed by at least twelve freeholders who are signers of the petition: *Minard* v. *Douglas County,* 9 Or. 206; *King* v. *Benton County,* 10 Or. 512. We therefore conclude that the complaint sufficiently charges that the County Court lacked jurisdiction to make the order establishing the highway.

3. As to the remaining allegations of the complaint, it may be said that they seek to raise issues which are *res judicata* and cannot be entertained by a court of equity unless the pleading discloses something more than the apparent inequity of the judgment which is attacked, such as accident, mistake, surprise or fraud: 15 R. C. L. 751. There is here no averment of any facts disclosing fraud, accident or mistake. The only allegation upon which plaintiff relies is, that being unfamiliar with the methods employed in establishing

roads, she had her husband inquire of the county judge as to what had been, or would be, done in the matter, and thereby was assured that she would be informed as to any action taken therein; that she relied upon such assurance and consequently failed to learn that her claim for damages had been ignored until the time in which an appeal might have been taken had expired. This statement amounts to no more than a confession of negligence upon the part of the plaintiff, which affords no ground for the interposition of a court of equity.

It follows that the only issuable controversy in the complaint relates to the jurisdiction of the County Court in the road proceedings, and as to that the pleading is sufficient. The demurrer should have been overruled. The decree is reversed and the cause remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and JOHNS, JJ., concur.

Argued at Pendleton October 30, reversed December 24, 1918.

DICKENSON *v.* HENDERSON.

(176 Pac. 797.)

Pleading—Conclusion of Law.

1. The pleading of a conclusion of law, if demurred to, amounts to a nullity.

Courts—County Court—Proceedings—Pleading.

2. Proceedings in County Court are somewhat informal, no definite rules of pleading being prescribed by the Code for that court.

Pleading—Conclusion of Law—Insanity.

3. The plea that a person is insane and incapable of conducting his own affairs is not a conclusion of law, but of fact.

[As to who is deemed to be an insane person, see note in 29 Am. Dec. 38.]

Insane Persons—Proceedings for Guardianship—Pleading—Jurisdiction.

4. To give the County Court jurisdiction of a petition for the appointment of a guardian for an alleged insane person, nothing more is necessary than to plead substantially the words of the statute; that is, that the person is insane or incapable of conducting his own affairs.

Insane Persons—Guardianship—Right of Children.

5. Neither son nor daughter of an aged and somewhat feeble and childish woman has any such interest in her property as to entitle them as of right to seek appointment of guardian over her estate in order to preserve it for them.

Insane Persons—Guardianship—Incapacity—Evidence.

6. On a daughter's petition for appointment of a guardian of the estate and person of her mother, evidence *held* insufficient to prove the mother was incapable of conducting her own affairs.

From Harney: DALTON BIGGS, Judge.

In Banc.

This is a proceeding to subject the estate and person of Laura A. Dickenson to a guardianship. On the eleventh day of June, 1917, Rose C. Henderson, a daughter of Laura A. Dickenson, filed a petition in the County Court of Harney County seeking to have herself appointed as guardian for the person and estate of her mother. The petition shows that Laura A. Dickenson was about 81 years of age, and possessed real estate of the value of about $6,000 located in Harney and Linn Counties, Oregon; that for about five years before the filing of the petition, Laura A. Dickenson had resided with said daughter in Harney County, and before that for about three years with her son near Waterloo in Linn County, and for some time before that with her son in Harney County; that said Laura A. Dickenson was about to leave Harney County with her son to live on her place in Linn County, and that she was insane and incapable of taking care of her own property. The petition further charges that the son would have undue influence over Laura A. Dickenson and would attempt to get posses-

sion of her property and cause the estate to be dissipated.

Laura A. Dickenson appeared at the hearing and filed a motion to dismiss the petition on the ground that it did not state facts sufficient to give the court jurisdiction over her person or estate. This motion was overruled and a trial had before the county judge, who appointed Rose C. Henderson as guardian of the person and estate of said Laura A. Dickenson. An appeal was taken by Laura A. Dickenson to the Circuit Court of Harney County, and the evidence submitted before the County Court was transcribed and was the only evidence submitted to the Circuit Court, which affirmed the County Court. Laura A. Dickenson appeals. REVERSED.

For appellant there was a brief over the names of *Mr. James K. Weatherford* and *Mr. C. A. Sweek,* with an oral argument by *Mr. Weatherford.*

For respondent there was a brief submitted by *Mr. J. S. Cook.*

OLSON, J.—The only two points to be disposed of on appeal are, first, should the County Court have overruled the motion to dismiss the proceedings on the ground that the petition did not state facts sufficient to give the court jurisdiction. Second, does the evidence sustain the decrees in both the County and Circuit Court holding Laura A. Dickenson so incapable of conducting her own affairs as to make the appointment of a guardian over her person and estate necessary.

1–4. As to the first question, it is contended the petition alleges that Laura A. Dickenson was insane and incapable of conducting her own affairs; that this al-

legation is a mere conclusion of law and not a statement of fact, and that under the rule, well settled in this state, the pleading of a conclusion of law when attacked by demurrer amounts to a nullity. It will be remembered, however, that the proceedings in the County Court are of their nature somewhat informal, and no definite rules of pleading are prescribed by the Code for said court. The plea, however, that a person is insane and incapable of conducting their own affairs is not a conclusion of law. It is a plea of fact of the same nature as if it were set up that a man were sick. The fact that a person is sick is usually reached from a deduction of numerous other facts, but the conclusion is nevertheless a fact. It would seem that in order to give the court jurisdiction nothing further would be necessary than to plead substantially the words of the statute, that is, that a person is insane or incapable of conducting their own affairs.

5, 6. As to the second point, the evidence in the case is very brief and a large portion of it incompetent. Upon the trial at the lower court the attorney for petitioner waived the claim that Laura A. Dickenson was insane, as alleged in the petition, and relied solely upon the ground that she was incapable of conducting her own affairs. The evidence shows that Mrs. Dickenson was possessed of 100 acres of land in Linn County, about one-half mile from Waterloo, about 50 acres of which was in cultivation with buildings located thereon; that there were neighbors on every side of her and a store immediately across the road; that she lived on this place for three years, returning to Harney County about 1911 for the purpose of taking up a homestead; that she did then take up a homestead and commuted on the same, and that her son lived with her at Waterloo and also lived with her a part of

the time in Harney County after her return there. There was evidence in the case showing that 40 acres of land had been purchased, payment being made in part by the son and in part by the mother. The petitioner contended in her evidence that this 40 acres had been deeded to the son without consideration, her proof being merely her own opinion of the matter, and hardly arising to the dignity of hearsay evidence. The son testified on the stand that he had furnished one half the consideration of the purchase for this 40 acres; that the title to the same still remained in the mother, and that he had not yet asked her to redeed it to him. The mother testified that as to this 40 acres half of it belonged to him and half to her and that she intended giving him all of it. Of the land in Harney County, 140 acres was inclosed by the petitioner and her husband and used by them for about nine years without paying any cash rent therefor. Mrs. Dickenson lived with petitioner for the last five years, and shortly before the filing of this petition the son came to Harney County and he and his mother planned to return to Mrs. Dickenson's home in Linn County. This the petitioner objected to and started the proceedings now before us. The evidence shows that petitioner one week before filing the papers in this case sought to purchase from her mother the 140 acres of land inclosed by herself and her husband, for $1,500, and that the mother refused to sell the land for that amount. The evidence also shows that Laura A. Dickenson was weak physically but not enough to prevent her from getting around with a cane and attending court and giving testimony and keeping the fire going at the Henderson home; that she had not had medical attention for over six years and then only a little medicine. She answered 52 questions on direct ex-

amination about as well as could be expected of a person 81 years of age, and the attorneys for petitioner did not avail themselves of the privilege of cross-examination. Three doctors were called upon the trial and all testified that Laura A. Dickenson was capable of handling her own affairs judging from their personal observation of her conduct at the trial and an oral examination made by them in the presence of the court. Their testimony, however, would not stand on any different basis than ordinary witnesses for the reason that the insanity charge had been withdrawn. The petitioner failed to prove that her mother had any other property except the real estate; that any of such real estate in Harney County had any income; or that the income from the farm in Linn County over and above the necessary charges had been dissipated. She failed to prove that Laura A. Dickenson had given away any of her real property or encumbered it or otherwise dissipated her estate. The evidence would seem to show that while Laura A. Dickenson was somewhat feeble physically and somewhat childish in some things, she had not reached such a weakened condition of body or mind as not to be able to realize what she was doing with her property, or to destroy her power of selecting persons to perform services for her in caring for her property or herself that she would not be able to perform alone. The evidence submitted goes no further than to establish that in view of the fact that the appellant was 81 years of age and somewhat feeble physically and somewhat absent-minded and forgetful, she probably *might* be influenced, and being so influenced, she *might* dissipate her estate; in fact the petition seems to show that the chief worry of the petitioner is that her brother Guy *might* obtain influ-

ence over his mother and *might* get the ownership and control of the property, thereby possibly reducing the amount petitioner *might* secure after the death of Laura A. Dickenson. This statement shows what a string of possibilities are used to establish the claim that the court should intervene and appoint a guardian for the person and estate of Laura A. Dickenson. Neither the son nor the petitioner have any such interest in the property of their mother as to entitle them as of right to seek the appointment of a guardian over such estate. The property of Laura A. Dickenson should be preserved as far as the same is necessary to provide for her care and support the balance of her life, and if she should choose to take all of her property and convey it to an Old Folks Home or any other institution or person, who would guarantee her proper care and support for the balance of her life, neither the petitioner or the brother would have the right to complain nor would the courts intervene to prevent such an arrangement fairly and honestly entered into.

The evidence in this case has been carefully examined and the conclusion arrived at is, that Laura A. Dickenson has not been proven incapable of conducting her own affairs. The decree of the lower court is reversed and the orders and proceedings of the County Court in the matter of the guardianship of Laura A. Dickenson will be set aside. REVERSED.

HARRIS, J., absent.

Argued October 18, affirmed December 24, 1918.

STATE *v.* STICKEL.

(176 Pac. 799.)

Larceny—Evidence—Identity—Admissibility.

1. In a prosecution for cattle theft, where it appeared that defendant rode a gray horse, *held*, under the circumstances, that witnesses who lived where they would probably have seen defendant going to the corral of the prosecuting witness might testify they saw two men riding gray horses, though they did not recognize them.

Criminal Law—Instructions.

2. The refusal of requested instructions covered by those given is not error.

Criminal Law—Request Covered by Instructions.

3. In a prosecution for the larceny of cattle, refusal of defendant's requested instructions that, before the jury could convict they must believe defendant was guilty of or in complicity with the original taking, *held* not erroneous; the instructions given presenting the same theory.

Witnesses—Credibility—Conduct of Witness.

4. In a prosecution for cattle theft, where defendant asserted an *alibi*, a witness testifying to seeing defendant under such circumstances as to corroborate that contention might be cross-questioned as to whether he did not testify at the preliminary examination of one also charged with the offense with whom he was on good terms, it appearing that such witness, who did not testify at defendant's first trial and lived in the vicinity, did not inform defendant of the matter until subsequently, etc.

[As to the impeaching witnesses, see note in 14 Am. St. Rep. 157.]

From Lake: L. F. CONN, Judge.

Department 1.

Vernon Stickel appealed from a conviction of the larceny of 23 head of cattle belonging to Andrew Keister. About 1 o'clock in the morning of August 25, 1917, Andrew Keister was awakened by "a terrible racket" made by the 71 head of cattle kept by him in a field about 80 rods east of his house. His "hay corral was in a bad condition" and he went to see "what was the trouble." He could "hear cattle bawling and

raising a fuss on'' his south line; but he did not ''know what the trouble was until the next morning'' when he ''started to hunt'' his cattle and discovered that one bull, ten heifers and twelve steers were gone. The three principal places to be kept in mind are: the Keister ranch, the place where Stickel was arrested and Clover Flat. The Keister ranch is about seven miles northwest of Lakeview. The frequent use of the words ''here,'' ''there'' and ''this'' by witnesses when pointing out places shown on a map makes it difficult to tell whether the place where Stickel was arrested is a part of the Martin homestead or a portion of the Bishop ranch or merely an inclosure adjoining the homestead or the ranch; and therefore for the sake of convenience we shall refer to the place where Stickel was arrested as ''the clearing.'' Wm. Bishop lives ''north of Lakeview, about twelve miles north and a little west''; Bishop's house is about three quarters of a mile south of the clearing and hence the place where Stickel was arrested is about thirteen miles northwest of Lakeview. Clover Flat is ''about twenty-two or twenty-three miles north of'' Lakeview. L. P. Mauzey conducted a ranch on Clover Flat and had cattle running on the range. Stickel was an employee of Mauzey and rode the range for cattle and did such other work as Mauzey directed him to do. ''By the way you ordinarily ride'' it is about ''twelve or fourteen miles'' from the clearing to the Mauzey ranch. The route traveled by the cattle in going from the Keister ranch to the clearing was ''between twelve and fifteen miles''; it was not a direct route; it was ''a pretty hard drive, * * because there were no trails or roads for them to follow. The cattle were tracked from the Keister ranch to the clearing. The evidence for the state was to the effect that when Snider, the

sheriff, Rinehart and Keister came upon Stickel in the clearing the latter attempted to escape, but the brush, into which the defendant rode his horse, was so thick that he could not get away. When asked about the appearance of the cattle when found in the clearing Keister stated that they "looked like they had been driven hard for several hours." P. W. Hotchkiss, a cattleman, expressed the opinion that it would take "the biggest part of twelve hours" to drive "that bunch of cattle" over the route traveled from the Keister ranch. Stickel was apprehended about noon. The sheriff testified that Stickel's horse "had been ridden hard, you could see, by the appearance of the horse and the way it acted." The sheriff also told the jury that Stickel "appeared to be pretty tired and sleepy; that was his appearance to me that day, and all that day." When arrested Stickel was wearing a heavy mackinaw coat and a pair of shaps, although it was a "very warm day"; it was sultry. Upon searching Stickel a flash-light was found in a pocket of the mackinaw. The witnesses who trailed the cattle stated that they could tell from the tracks that two horses had followed the cattle; that one horse was shod and the other barefooted. The horse which Stickel had been riding was shod and it was led beside the tracks made by the shod horse which had been following the cattle, and five witnesses gave testimony from which the jury could have found that all the shod horse tracks were made by the same animal. Even the defendant himself, who was present when the comparison was made, testified that the tracks compared favorably.

John Metzker, who lives about a mile west of the Keister ranch, says that sometime during the morning of August 25th "a bunch of cattle came by" his ranch and that there were "two fellows with them with"

gray horses. On August 16th Stickel and Mauzey were in the neighborhood of the Keister ranch and each was riding a gray horse. Stickel was riding a gray horse when arrested. Mauzey owned two gray saddle-horses. In company with Stickel and two others the sheriff rode to the Mauzey ranch at sometime in the afternoon of August 25th. Mauzey was not at home. When the sheriff went to the barn he found that "the hogs were locked up"; and when Stickel "opened the gate they all came running out of the barn and down into the field." The state claimed that this evidence tended to show that the hogs had been locked up in the barn for a considerable time. The sheriff then examined a gray saddle-horse on the Mauzey ranch and found that the horse "had sweat on, under the saddle, where the blanket had been." This horse, however, upon examination, was found to be shod. It is appropriate to state in this connection that there was testimony in behalf of the defendant showing that both gray saddle-horses owned by Mauzey had been shod on August 16th. On the evening of August 25th Wm. Bishop, who owns the Bishop ranch, and Frank Wilson, a neighbor, "made a trip over to Cox Creek, over near the Cox place and out to the county road and up a little distance" and while "traveling in a rig" when it was "getting a little dusk" they met Mauzey riding a gray horse. Speaking of the incident, Bishop testified that when Mauzey "saw us he started to leave the road, reined his horse off, and looked at us, and came back alongside of the road" and that Mauzey pulled out of the road "a matter of thirty feet" or more. Frank Wilson testified that when they met Mauzey, "he was riding north at the time, towards Clover Flat."

Stickel claimed that in the afternoon of August 24th he and Mauzey saddled their horses and "went up past Mill Flat and got a steer and went back home"; that they returned to the Mauzey ranch with the steer "between sundown and dark"; that they stayed at the Mauzey ranch "on the night of the 24th"; that on the morning of August 25th Mauzey and Stickel saddled the gray horses and rode together as far as Little Mill Flat where they separated. Stickel testified that Mauzey had contracted to sell some steers and dry cows and that they were riding the range for the purpose of gathering Mauzey's cattle. The defendant also told the jury in substance that just before he came upon the cattle in the clearing he saw two horsemen and when he started to catch up with them they rode away from him, leading him to believe that his presence was not wanted; that he came upon the cattle in the clearing and rode among them for the purpose of ascertaining whether any of the animals belonged to Mauzey; that he "didn't recognize Mr. Snider or Mr. Rinehart" when he first saw them approaching the clearing and, because of the suspicious actions of the two horsemen whom he had previously seen, it was his "idea to run in the brush and scout around and see what was doing."

The assignments of error relate to the admission of evidence, and the refusal of the court to give two instructions requested by the defendant. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Batchelder & Combs,* with an oral argument by *Mr. Charles H. Combs.*

For the State there was a brief over the names of *Mr. George M. Brown,* Attorney General, and *Mr. T. S.*

McKinney, District Attorney, with an oral argument by *Mr. Brown.*

HARRIS, J.—1. Charles Gotcher and Bill Burch were "at the Cox place" on the evening of August 24th and about dusk they saw two men riding gray horses. When the witnesses first saw the horsemen the latter were going east, but when a little over a quarter of a mile from the witnesses the horsemen "turned around the corner of the fence" and rode "south towards Lakeview." Neither of the witnesses was able to identify the horsemen and it is therefore contended by the defendant that it was error to permit the witnesses to testify about seeing these two horsemen. The Cox place is near the Bishop ranch and hence not far from the clearing. When we remember the relative locations of the Mauzey, Cox and Keister ranches, and when we remind ourselves of the testimony given by the several witnesses concerning two gray horses it is at once apparent that the testimony given by Gotcher and Burch was competent. The facts in *State* v. *McPherson,* 70 Or. 371, 375 (141 Pac. 1018), and *State* v. *Olds,* 19 Or. 397, 439 (24 Pac. 394), relied upon by the defendant, are dissimilar to those we are now considering; and hence those precedents have no application here. The circumstance that two horsemen were seen riding two gray horses at the time and place when seen by the two witnesses was competent when considered in connection with the other evidence concerning gray horses.

2. The defendant complains because the court refused to give requested instructions Nos. 1 and 4. Requested instruction No. 1 is as follows:

"I instruct you that larceny is the unlawful taking, carrying away or driving away the property of another with the intent to deprive the owner thereof. I

further instruct you that in this case when the cattle in question were driven from the field of the owner with the intent to deprive him thereof, the crime of larceny was completed."

Requested instruction No. 4 reads thus:

"Before you can convict this defendant, you must believe beyond a reasonable doubt, that he is guilty of, or in complicity with, the original taking, and any subsequent connection after the taking would not be larceny in him whether in good or bad faith; and if you believe that this defendant came into possession of the cattle in question after the felonious taking, whether in good or bad faith, he is not guilty of larceny and you must acquit him."

The charge which the trial judge gave to the jury completely covered the first requested instruction and it was therefore not error for the court to refuse to repeat what he had already told the jury.

3. After enumerating all the material allegations contained in the indictment, and explaining that it was necessary for the state to establish the truth of the material allegations beyond a reasonable doubt, and after saying that larceny is the felonious taking of the personal property of another with the intent to deprive the owner thereof, the court gave the following instruction:

"Felonious intent means, without the color of right in taking, and to make the taking of property felonious, the taking must be such, and accompanied by such circumstances, as to show a felonious intent, that is, an intent to steal the property, and before a defendant can be convicted on a charge of larceny, it must be proven, beyond a reasonable doubt, that he was guilty of, or in complicity with, the original taking of the property charged to have been stolen."

The matter contained in the requested instruction appears in the instruction given by the court; and an

examination of the entire charge makes it obvious that the jury understood the theory of the state and the theory of the defendant and that the jury was advised and knew that the defendant could not be convicted if he did no more than merely to ride among the cattle in the clearing for the purpose of discovering whether any of them belonged to Mauzey.

4. H. Hopkins was called as a witness for the defendant and, after testifying that he resided at Clover Flat and that he was acquainted with Mauzey and the defendant, he stated that on August 24th he was running a header on the Jack Barker farm at Clover Flat and in the evening when returning from work to his home he came in sight of Mauzey and Stickel, each of whom was riding a gray horse, and that they were "driving a cow of some description." Hopkins explained that Mauzey and Stickel were off about two hundred yards and that he saw "them for a little bit and then they went out of sight in the timber." On cross-examination and in response to the question "You are very friendly with Louis Mauzey, are you not?" he answered, "On good terms"; and then over the objection of the defendant the following question was asked:

"Were you not a witness for him in the preliminary examination of the charge of larceny against him?"

The witness answered, "I was."

Hopkins was not called as a witness until after Stickel had testified in his own behalf and after Mauzey had appeared as a witness for the defendant. Stickel had explained that he and Mauzey had driven a steer to the latter's ranch on the evening of August 24th; Mauzey had corroborated Stickel by telling the jury that at some time after 2 P. M. on August 24th they saddled their horses "and came up over the top

of the mountain, down to this side and got a steer that belonged to me, and took him home," arriving home "about dark, between sundown and dark, but I think almost dark"; and it is therefore manifest that the testimony given by Hopkins about seeing Stickel and Mauzey "driving a cow of some description" was highly important to the defendant, because it tended to corroborate defendant's claim that he was at Mauzey's ranch on the night of August 24th, and it also tended to neutralize any damaging inferences that might be drawn from the testimony of Gotcher and Burch since, on account of the distance between the Cox and Mauzey ranches, Stickel and Mauzey could not have been the persons who were riding the gray horses at the Cox ranch if they were in truth driving an animal as narrated by Hopkins. The only material information given to the jury by Hopkins on his direct examination was his testimony about seeing Stickel and Mauzey on the evening of August 24th. If the purpose of the question asked Hopkins was to discredit Mauzey by showing that he had been arrested, then the testimony was incompetent; but it does not necessarily follow that the evidence was incompetent for all purposes: *State* v. *Farnam,* 82 Or. 211 (161 Pac. 417, Ann. Cas. 1918A, 318). The quoted question and answer, which were objected to by the defendant, were followed by two other questions and answers and then the cross-examination continued as follows:

"Q. Did you see Mr. Mauzey at the time Mr. Stickel was arrested, at the time of his preliminary examination?

"A. I saw him, I think I saw him at a distance.

"Q. Did you have any conversation with him?

"A. I don't remember that I did.

"Q. Did you have any with him, between that time and the time of the first trial of this case?

"A. I don't remember I had any conversation with him.

"Q. You didn't inform him, or this defendant, of this piece of information that you saw them on this day, until when?

"A. I think after the trial.

"Q. After the first trial?

"A. Yes.

"Q. Were you present during the first trial?

"A. No, sir."

In other words, notwithstanding the fact that Hopkins was a witness for Mauzey at the latter's preliminary examination, and in spite of the circumstance that he saw Mauzey at the time of Stickel's preliminary examination, and although he lived at Clover Flat, nevertheless Hopkins did not inform Mauzey or Stickel of having seen them on the evening of August 24th until after the first trial of Stickel. The jury did not agree at the first trial of Stickel. The fact that Hopkins delayed in telling Mauzey or Stickel about having seen them on August 24th was a circumstance which the state had the right to submit to the jury to be considered by the jury in determining the weight and value of the testimony given by Hopkins, and hence it was competent to ask Hopkins whether he had been a witness for Mauzey at the latter's preliminary examination.

The rulings of the trial judge throughout the trial were fair; Stickel was defended by diligent and able counsel; the verdict of the jury forecloses debate about his guilt; and it therefore follows that the judgment must be and it is affirmed. AFFIRMED.

McBRIDE, C. J., and BENSON and BEAN, JJ., concur.

Argued at Pendleton October 31, reversed December 31, 1918.

DEARDORF *v.* IDAHO NAT. HARVESTER CO.

(177 Pac. 33.)

Corporations—Foreign Corporations—Jurisdiction of State Courts.

1. In determining authority of agent of foreign corporation in its relation to question whether corporation is doing business within the state, so as to be subject to jurisdiction of its courts, the agent's written contract of appointment must be taken as a whole, and question must turn upon the manner in which he was to carry out appointment.

Corporations — Foreign Corporations — Jurisdiction "Doing Business" Within the State.

2. Contract between agent, engaged in soliciting business in state, and defendant harvester company, a foreign corporation, *held* to give to agent no authority further than to solicit, etc., so that defendant was not "doing business within the state" and was not subject to jurisdiction of courts of state, under Section 528, L. O. L., as amended by Laws of 1911, page 148.

Courts—Extraterritorial Effect.

3. The laws of a state have no extraterritorial effect.

Corporations—Foreign Corporations—Subjection to State Laws.

4. Until a foreign corporation comes within the state to "do business" as the term would be applied to an instance, where it permanently locates and actually transacts its business, the state laws cannot have any effect upon it.

Corporations—Foreign Corporations—Jurisdiction of State Courts.

5. Mere solicitation, within a state, of orders to be sent out to home office of a foreign corporation as offers to be accepted there or rejected, constitutes interstate commerce and does not amount to corporations coming into the state, so as to subject itself to that jurisdiction.

Corporations—Foreign Corporations—Jurisdiction of State Courts.

6. While it is possible for a foreign corporation to become subject to jurisdiction of Oregon courts, even while transacting interstate commerce, that result is not to be predicated upon the fact that an agent only solicited residents to send out of the state an offer to be accepted and filled in another state.

Corporations — Foreign Corporations — Process—Return—Conclusiveness.

7. Sheriff's return of service of summons, reciting that defendant, foreign corporation, was at time of service doing business within the state, is not conclusive upon the court when called upon to decide its own jurisdiction.

[As to jurisdiction over foreign corporations, see note in 85 Am. St. Rep. 905.]

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

The plaintiffs allege the breach of a warranty of a National Combine Harvester which they aver the defendant, an Idaho corporation, sold to them with the guaranty mentioned. The sheriff's return of service of summons is as follows:

"State of Oregon,
County of Umatilla,—ss.

"I hereby certify that I served the within Summons on the within-named defendant, Idaho National Harvester Company, by delivering to Jesse A. Mathes, on October 23, 1917, a copy of said summons certified to by me as Sheriff, together with a copy of the complaint in this cause certified to by D. W. Bailey, attorney for the plaintiff; that such service was so made at Umatilla County, Oregon, and by delivering such copies to him in person; that at the time such service was so made the said Jesse A. Mathes was the agent of the said Idaho National Harvester Company, who was at that time doing business within Umatilla County, Oregon, and that said Jesse A. Mathes was then a resident of Umatilla County, Oregon, and transacting business within said County for the defendant. That at the time of said service the president or other head of said defendant, secretary or managing agent did not reside nor have an office in my said County.

"That said Jesse A. Mathes as such agent of defendant was engaged in soliciting business for defendant to be transacted in this state and elsewhere.

"T. D. TAYLOR, Sheriff.
"By J. A. BLAKELY, Deputy."

The defendant appeared specially and moved to quash the service of summons, because: (1) The return does not show that the summons was served upon the defendant; (2) The defendant during all of the times mentioned in the complaint and at the time of the at-

tempted service of summons, was a foreign corporation not engaged in or doing business in the State of Oregon, and the matters complained of occurred in the course of interstate commerce in a business conducted by the defendant; (3) The service of summons was not made upon any person competent under the law to accept service, so as to bind the defendant. Other reasons given are simply variations of those already mentioned. In support of the motion the affidavits of the general manager and the bookkeeper of the defendant company were filed, setting forth the manner of carrying on the transaction in question. These are best exemplified by a *résumé* of the terms of the agent's contract, of date February 19, 1917, between the defendant and Jesse A. Mathes, of Echo, Umatilla County, Oregon. The first clause narrates in substance that the company has constituted Mathes "its sole and exclusive agent during the year 1917, to handle, sell and dispose of harvesting-machines and extras therefor, manufactured by" the company, and confines his activities to Umatilla and Morrow Counties in the State of Oregon. It is further stated in that contract as follows:

"That the party of the first part hereby agrees to furnish to the party of the second part twenty (20) of its harvesting machines known as the 1917 Model to be manufactured during the years 1916 and 1917 and to be placed on board the cars not later than July 1, 1917, at Moscow, Idaho, consigned to the party of the second part, freight collect, and the party of the second part hereby agrees to furnish the party of the first part with orders on said party of the first part's regular order blanks to cover the sale of twenty (20) machines by April 1, 1917, or release said first party from the obligation of furnishing any more machines than orders are received in its Moscow, Idaho, office on April 1, 1917.

"It is agreed that the party of the second part shall cause to be paid to the party of the first part the full sum of Twelve Hundred ($1200.00) Dollars for each machine so delivered f. o. b. Moscow, Idaho, which said sum is to be paid upon the following terms: Two Hundred Fifty ($250.00) Dollars cash to be paid by the party of the second part to the party of the first part at Moscow, Idaho, at the time of the order therefor is transmitted to said first party or be evidenced by a note becoming due not later than April 1, 1917; Four Hundred Fifty ($450.00) Dollars to be covered by a note drawing eight (8) per cent interest from July 1, 1917, and maturing October 1, 1917; and Five Hundred ($500.00) Dollars to be covered by a note drawing eight (8) per cent interest from July 1, 1917, and maturing October 1, 1918. Any number of machines in addition to the twenty (20) machines which shall be ordered and delivered as aforesaid shall be furnished, delivered and paid for according to the terms incorporated in this agreement for the delivery and payment of the twenty (20) machines above mentioned."

For his services in the matter Mathes was to receive 10 per cent commission on the purchase price of each *bona fide* sale. The defendant also sets forth, as part of its showing to support its motion, the order made by the plaintiffs, as follows:

"ORDER FOR MACHINE.

"Idaho National Harvester Co., Ltd. (Incorporated),
Moscow, Idaho, U. S. A.

"Gentlemen: The undersigned of Echo postoffice, County of Umatilla, State of Oregon, hereby purchases of you, to be shipped in time for the coming harvest, one of your 1917 Model National Combine Harvesters upon the following terms: $1200.00 f. o. b. Moscow, Idaho; Two Hundred Fifty Dollars June 15 cash with order and approved notes as follows: $450.00 payable on the fifteenth day of November, 1917, $500.00 payable on the fifteenth day of November, 1918. This order to be canceled in case of crop

failure. Said notes to draw interest at the rate of 8 per cent per annum from date June 15 until maturity, and 10 per cent per annum from maturity until paid.

"Five (5) per cent discount on last deferred payment if paid by November 15, 1917. Extras furnished free first year, except chains, where workmanship or material is at fault.

"Combine equipped with filled wheel and extra heavy roller guard.

"WARRANTY.

[Here follows warranty as set forth in the complaint.]

"The purchaser waives all claims for damages caused by accident, strike, or delay after the machine leaves the factory. This order is to be sent to the Idaho National Harvester Company, Limited, Moscow, Idaho, for acceptance or rejection and shall only be binding on said company when accepted hereon.

"You will please ship on or before the June 15th day of 1917 (or as soon thereafter as possible) to D. F. Depperman and J. H. Deardorf, State of Oregon, in care of O.-W. R. & N. (P. C. Hunter, agent of company) for the undersigned.

"Dated the 7th day of May, 1917.

"(Signed) J. H. DEARDORF.

"D. F. DEPPERMAN.

"Sold by JESS A. MATHES.

"This order is taken subject to the approval of the Home Office."

It appears also that the plaintiffs gave their notes, one for $450 and the other for $500, both payable to the defendant at its office in Moscow, Idaho, representing part of the price of the machine. The plaintiff Depperman filed his affidavit to the effect that he negotiated for the purchase of the machine with Mathes, delivering the contract for the purchase price to him with the notes, and received from him the written warranty sued on in this action, all at Echo, Oregon. He claims that the plaintiffs never had any transaction with the company or the agent except at

that place, and that all of such transactions on which the issue arose occurred there.

The Circuit Court denied the defendant's motion and, it having failed further to plead, rendered judgment against it for the amount claimed by the plaintiffs as damages. The defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Messrs. Suppiger & Ogden, Mr. C. M. White* and *Messrs. Raley & Raley,* with an oral argument by *Mr. White.*

For respondents there was a brief with an oral argument by *Mr. D. W. Bailey.*

BURNETT, J.—As early as *Hacheny* v. *Leary,* 12 Or. 40 (7 Pac. 329), this court held that soliciting business in a state for a nonresident corporation was not doing business within that state. That was a case where the plaintiffs claimed as indorsees of a note said to have been given in payment of an overdue premium on a previously issued policy of life insurance held by one of the defendants in a Kansas life insurance company. The company had an agent in Seattle, Washington, who solicited one Yesler to take out a policy on his own life. He received Yesler's application with the amount of the first premium in cash and forwarded them to the home office at Leavenworth, Kansas, for examination and approval by the company. Thereupon the insurance company accepted the application in Kansas, issued the policy and sent it by mail to the insured at Seattle. The second premium was not paid and the local agent then took from the insured a note for that amount and sent it to the company in Kansas. This was afterwards assigned to the plaintiff, who brought the action, and the defense was that

the note was taken in violation of the Washington law that foreign corporations could not do business in that state except under certain conditions with which the company had not complied. Treating, however, of the application for the policy sent for acceptance by the company in Kansas and the forwarding of the policy from that state, the court, speaking by Mr. Justice LORD, said:

"The final act which made the transaction a binding contract upon the parties was the acceptance of the application. Until this took place it was a mere proposition tendered, to be accepted or rejected. The contract was consummated when the company acted upon the proposal and issued the policy, for then the minds of the parties had met and agreed, 'What was before,' says HARRIS, J., 'a mere proposition then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's application, and issued and transmitted to him their policies': *Hyde* v. *Goodnow*, 3 N. Y. 270. It was, therefore, a contract of insurance made and executed in Kansas": Citing authorities.

The court, however, went on to hold that subsequently taking the note in Washington for the overdue premium was transacting business within that state in violation of its statute and hence that the plaintiff's claim on that note would not be enforced. This last feature, however, was disregarded by this court in *Bertin & Lepori* v. *Mattison*, 69 Or. 470 (139 Pac. 330). There, a traveling man employed by the plaintiff, a corporation of California, took the orders of a Portland firm for goods which were sent by the plaintiff from San Francisco to the purchaser in Portland. Not having the ready cash when the shipment arrived,

the Portland firm gave its note in Oregon, which Mattison and another there signed as accommodation makers. This court held that our statute restricting the operation of foreign corporations has no application to a case where such a concern sends into the state its traveling salesman, who takes orders and forwards them to the home office for its approval, the orders being afterwards filled by shipment to the customer. Substantially the same principle was upheld in *Spaulding* v. *McNary,* 64 Or. 491 (130 Pac. 391, 1128). There, the plaintiff manufactured carriages in Iowa. To effect sales of the same he employed agents who traveled through this state, among others, taking orders for vehicles of the kind, sending the orders to the plaintiff in Iowa, who after ascertaining the financial standing of the proposed buyer and being satisfied concerning it, shipped the carriage to Oregon to be delivered to the buyer by another agent. It was there held that this constituted a transaction of interstate commerce business which this state had no right to hamper by restrictive regulations. The same principle is reiterated by Mr. Justice BEAN in *Vermont Farm Machine Co.* v. *Hall,* 80 Or. 308 (156 Pac. 1073), to the effect that since taking orders to be filled by shipment of goods from another state or making sales by sample, by agents coming into the state for that purpose, is interstate commerce, in order to constitute "doing business" within this state by the plaintiff, the agent must have ample authority to transact some substantial portion of the seller's business or to make complete sales and not merely to take orders for goods.

1, 2. It is true that the general words of the contract were that Mathes was appointed for a year, "to handle, sell and dispose of harvesting-machines and extras therefor." We must, however, take the whole

instrument together and the case must turn upon the manner in which he was to carry out his part of the appointment. Succinctly stated, he had no authority in the premises further than to solicit a written application from a prospective buyer and tender it with the notes required to the defendant at its home office in Idaho, when if approved by it the machine applied for would be forwarded to the purchaser. It is plain that under all decisions this does not constitute doing business within the state so as to subject the corporation to the jurisdiction of our courts.

Section 528, L. O. L., as amended by the act of February 18, 1911, Laws of 1911, Chapter 103, reads thus:

"No corporation is subject to the jurisdiction of a court of this state, unless it appears in the court, or have been created by or under the laws of this state, or have an agency established therein for the transaction of some portion of its business, or have an agency established therein for the purpose of soliciting some portion of its business to be transacted in this state or elsewhere, or have property in this state; and in the last case only to the extent of such property at the time the jurisdiction attached."

3–6. It is axiomatic that the laws of a state have no extraterritorial effect. It is equally evident that until a foreign corporation comes within the state to do business as the term would be applied to an instance where it permanently locates here and actually transacts its business here, the state laws cannot have any effect upon it. Under the well-established principle, therefore, that the mere solicitation within a state of orders to be sent out of that state to the home office of a foreign corporation as offers to be accepted there or rejected by it, the goods ordered to be forwarded

to the would-be purchasers only in the event of acceptance, constitutes interstate commerce and does not amount to the foreign concern's coming into the state where the orders were solicited so as to subject itself to that jurisdiction, we must lay out of this case that part of this statute which asserts authority over a foreign corporation if it has an agency established in this state for the purpose of soliciting some portion of its business to be transacted "elsewhere." It is, indeed, possible for a foreign corporation or a citizen of another state to come into this state and become subject to the jurisdiction of the Oregon courts even while transacting interstate commerce from within this state, but that result is not to be predicated upon the fact that an agent only solicited residents here to send out of the state an offer to be accepted and filled in another state.

As said by Mr. Justice DAY in *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79 (62 L. Ed. 587, Ann. Cas. 1918C, 537, 38 Sup. Ct. Rep. 233):

"As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it: *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530 (51 L. Ed. 916, 27 Sup. Ct. Rep. 595); *Philadelphia & Reading R. R. Co.* v. *McKibbin*, 243 U. S. 264 (61 L. Ed. 710, 37 Sup. Ct. Rep. 280)."

To like effect is *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.* (C. C. A.), 250 Fed. 160.

7. The return of the sheriff is not conclusive upon the court when called upon to decide its own jurisdiction. The officer's report of his doings may be contradicted by evidence *aliunde*. It is not within his power to forestall the decision of the court upon the question of whether the person upon whom service was attempted is such an individual as represents the corporate defendant for that purpose. The conclusion of the whole matter is that it appears without dispute that Mathes had no authority to do more than to solicit business for the approval of the company at its home office in Idaho; that the offer was accepted there, making it an Idaho contract, and that the transaction involved did not constitute doing business within this state amounting to an appearance or presence of the corporation here. For the error of refusing to quash the service, the judgment is reversed, with directions to the Circuit Court to set aside the service of summons. REVERSED.

Mr. Justice HARRIS was not present at the hearing of this case.

Submitted on briefs at Pendleton October 26, affirmed December 31, 1918.

WILHELM *v.* WILHELM.

(177 Pac. 57.)

Divorce—Suit Based on Desertion—Evidence Admissible.

1. Where, in divorce suit charging desertion from and after a certain date, plaintiff's testimony showed that on such date the parties were not living together, evidence as to plaintiff's misconduct was properly admitted, although defendant's answer was in effect a general denial.

Divorce—"Desertion."

2. Separation alone is not desertion.

[As to what constitutes desertion as a ground for divorce, see note in 138 Am. St. Rep. 146.]

Divorce—Desertion—Essential Proof.

3. Where, in divorce suit charging desertion from and after a certain date, plaintiff's evidence disclosed that the parties were living separate on such date, it became necessary as a part of plaintiff's case to prove that the separation was such that it would constitute a desertion, if continued for a year from that date.

Divorce—Desertion—Evidence—Sufficiency.

4. Defendant's offer to resume living with plaintiff, made within a year after their initial separation, would break the period of desertion, and it was incumbent upon plaintiff, if he wished to start the statutory period of desertion, to give notice to defendant of his desire to have her return to him.

Divorce—Decree Denying Divorce—Review.

5. Trial court having had the opportunity of hearing the witnesses in the instant case, and also in prior divorce suit between the parties, court on appeal will give some weight to findings of trial court in reviewing decision denying divorce.

From Union: JOHN W. KNOWLES, Judge.

In Banc.

This is a suit for divorce. Plaintiff and defendant were married in 1906 and on October 16, 1915, while living at La Grande, Oregon, domestic relations grew somewhat strained, and an agreement was entered into between the parties in writing dividing the property they then owned and agreeing that henceforward each party would pay his own living expenses out of his own income and property. The defendant left La Grande and went to Portland, and afterwards to Woodburn, Oregon, where she is engaged in the millinery business.

In the spring of 1916 plaintiff filed a divorce suit against the defendant with the result that in September, 1916, he was denied a decree of divorce. On September 13, 1916, defendant wrote plaintiff a letter full of expressions of love and affection and stated

her willingness to live with plaintiff at La Grande or any other place, and asked him to come to her. This letter was not answered by defendant, and on March 21, 1918, another letter of similar import was sent by defendant to plaintiff by special delivery, and receipt thereof refused by plaintiff. There is also evidence that other letters were sent by defendant stating her willingness to live with plaintiff as husband and wife. On March 22, 1918, plaintiff filed a complaint alleging that from the first day of October, 1916, defendant "without cause or provocation willfully deserted this plaintiff and has at all times since said date and still continues to live separate and apart from plaintiff, and has refused and continues to refuse to live with plaintiff."

The answer filed was a general denial, and in addition thereto a statement that defendant was at all times willing to condone the delinquencies of plaintiff and live with him as his wife, and that plaintiff had prevented her from so doing. The Circuit Court refused a decree of divorce and plaintiff appeals.

AFFIRMED.

For appellant there was a brief submitted over the name of *Messrs. Crawford & Eakin.*

For respondent there was a brief prepared and submitted by *Mr. Charles H. Finn.*

OLSON, J.—This suit is brought on the single ground of desertion. The desertion charged does not run from the time of the actual separation of plaintiff and defendant, but is charged as occurring from and after the first day of October, 1916. The defendant gave evidence in the case that the original separation was caused solely by plaintiff in that he had for some

time prior to the separation, been carousing around and becoming intoxicated and taking other women out in his automobile, and further that he told defendant he did not love her any more and wanted her to leave. Also that he leased the house and furniture to another party while they were occupying the same, and in effect ordered her to leave.

1. Plaintiff admits in effect his attentions to other women but denies that he ordered defendant to leave him, and introduces in evidence the agreement for the division of the property wherein it is provided that each party shall pay their own expenses thenceforward. Plaintiff contends on appeal that all the evidence as to the misconduct of plaintiff was improperly admitted in this case in that the answer pleads in effect only a general denial. This position is not well taken for the reason that the testimony of plaintiff shows that on the first day of October, 1916, defendant and plaintiff were not living together, and in order to determine a desertion for the statutory period of one year that would commence on that date and run continuously from that time, it is necessary to ascertain the relations of the parties prior to that time and the reasons for their separation.

2, 3. Separation alone is not desertion: *Luper* v. *Luper*, 61 Or. 418 (96 Pac. 1099). A husband and wife are often absent from each other by agreement, for traveling, business, education or merely pleasure, and such absence while agreed to by both parties, is not desertion, even though continued for a period of several years. When plaintiff's evidence disclosed the fact that on October 1, 1916, plaintiff and defendant were living separate and no change in their relations was made on that date, it became necessary as a part of plaintiff's case to prove that the separation was

such that it would constitute a desertion if continued for a year from that date.

Commissioner Slater in *Luper* v. *Luper,* 61 Or. 418 (96 Pac. 1099), has defined desertion tersely as follows:

"Desertion or abandonment consists in the voluntary separation of one spouse from the other for a prescribed period of time without the latter's consent, without justification and with the intention of not returning."

4. We have carefully examined the evidence in this case and find therein no offer on the part of plaintiff to make a home for defendant at any time since they separated, no request on his part for her to return, and no answer favorable or otherwise to her numerous requests for reconciliation and resumption of marital relations. The offer of defendant to resume living with plaintiff came within a year after their initial separation on October 16, 1915. This would break the period of desertion, assuming for the purpose of argument that defendant ever deserted plaintiff. It was incumbent upon plaintiff, if he wished to start the statutory period of desertion, to give notice to defendant of his desire to have her return to him in order to establish the necessary element that such desertion was without the consent of plaintiff.

5. There is some little conflict in the testimony, but the trial judge having had the opportunity of hearing the witnesses in this case, and also in the other case preceding it, some weight should be given to his findings.

The decree is affirmed. AFFIRMED.

Submitted on briefs at Pendleton October 29, affirmed in part and reversed and remanded in part December 31, 1918.

HINTON *v.* ROETHLER.

(177 Pac. 59.)

Appeal and Error—Harmless Error—Overruling Motion for Nonsuit.

1. Any error committed by the court in overruling a motion for nonsuit was cured, if any of the parties afterward introduced evidence sufficient to sustain the verdict.

Principal and Agent—Relation—Question for Jury.

2. In action for breach of contract to deliver sheep, whether the person executing the contract for defendant was authorized to do so, or whether his act was ratified by defendant, *held* for the jury.

Principal and Agent—Relation—Proof.

3. Agency may be proved by the testimony of the alleged agent.

Principal and Agent—Pleading and Issues.

4. Under an allegation that defendant agreed to sell 400 head of sheep, plaintiffs could prove that the agreement was made by defendant in person, or by his authorized agent, or by one whose acts, though not previously authorized, were afterward ratified.

Principal and Agent—Liability of Principal.

5. A person is not liable on a contract executed by another in his behalf, unless he previously authorized or subsequently ratified the act.

Trial—Instructions.

6. Each instruction should be viewed in connection with the remaining instructions, and should be considered as a whole.

Principal and Agent—Liability of Agent.

7. Where one holds himself out as an agent and executes a contract in behalf of another, he is liable on an implied warranty that he is an authorized agent, where he was neither previously authorized nor the act afterwards ratified.

[As to liability of agent executing contract in name of principal without authority, see note in **Ann. Cas.** 1915D, 722.]

Principal and Agent—Liability of Agent—Pleading.

8. In a plain action on a contract, recovery cannot be had against one of two defendants on the ground that he falsely held himself out as the authorized agent of the other defendant.

Sales—Issues—Contract.

9. In an action on a certain written contract to deliver sheep, executed by A. on behalf of R., recovery cannot be had from A., who subsequently, on R.'s failure to deliver, agreed to procure other sheep for plaintiff on the same terms; A.'s agreement being a new contract.

From Malheur: DALTON BIGGS, Judge.

In Banc.

W. W. Hinton and John Reece, partners doing business under the firm name of Hinton & Reece, brought this action against Amos Roethler and J. B. Adrian for the recovery of damages resulting from a breach of an agreement for the delivery of some sheep. It is alleged in the complaint that:

"The plaintiffs entered into written contract with the defendants and each thereof, wherein and whereby the plaintiffs purchased from the defendants, and the defendants and each thereof sold to the plaintiffs, four hundred head of fine ewe sheep from two to five years old, to be absolutely sound mouth stuff, at the agreed price of $14.50 per head, and in said contract the defendants and each thereof promised and agreed to deliver said sheep to the plaintiffs at Juntura, Oregon, on September 15th, 1917."

It is also averred in the complaint:

"That immediately upon the execution and delivery of said contract as aforesaid, the plaintiffs paid to the defendants on the purchase price of said sheep the sum of $400, and defendants received the said sum on said contract price, and acknowledged receipt thereof in the said written contract, and ever since said time the defendants have retained the said sum of $400 and now have the same in their possession."

After alleging that the defendants failed to deliver the sheep contracted for and after specifying the damages, the complaint concludes with a prayer for judgment "against the defendants and each thereof" for $400, the amount paid by the plaintiffs when the agreement was made, and also for damages in the sum of $1,625.

Roethler and Adrian answered separately; and the answer of each consisted of a general denial. Upon motion of Adrian the court directed a verdict for that

defendant; but as between the plaintiffs and Roethler the cause was submitted to the jury. The jury awarded the plaintiffs a verdict against Roethler. The plaintiffs appealed from the judgment obtained by Adrian; and Roethler appealed from the judgment rendered against him.

AFFIRMED IN PART. REVERSED IN PART.

For appellant there was a brief submitted over the names of *Mr. Julien A. Hurley* and *Mr. Gus A. Hurley.*

For respondent Hinton & Reece, there was a brief presented by *Mr. John W. McCulloch* and *Mr. W. W. Wood.*

For respondent Adrian, there was a brief over the names of *Mr. Joseph J. Heilner* and *Mr. Geo. E. Davis.*

HARRIS, J.—The plaintiffs contend that Adrian was the agent of Roethler, and that acting as such agent, he made an agreement obligating Roethler to deliver 400 head of sheep to the plaintiffs. It was claimed by the plaintiffs that after Roethler failed to deliver the sheep "Adrian agreed to get them himself, and deliver them to plaintiffs," and that "Adrian thereby adopted the contract as his own and became bound by its terms"; and the complaint was therefore framed upon the theory that the two defendants were jointly and severally liable to the plaintiffs.

A statement of some of the evidence found in the record will be helpful. The negotiations which terminated in a written agreement were carried on by Hinton and Adrian. The writing recites that it is a contract "between Amos Roethler of Westfall, seller, and Hinton & Reece of Ontario, buyer"; and that the seller has sold to the buyer "about 400 head of fine

ewes 2 to 5 year old to be absolutely sound mouth stuff at $14.50 per head. Time and place of delivery about Sept. 15, '17 at Juntura." The receipt of $400 is acknowledged as a partial payment of the purchase price; the instrument is dated July 28, 1917; and the writing is signed thus: "Amos Roethler, seller, By J. B. Adrian."

Adrian testified, in substance, that he told Roethler that he thought that he could sell some of the latter's sheep at $14.50 per head to the plaintiffs and that Roethler stated that he would pay a commission of 50 cents per head if Adrian made the sale. Adrian says that shortly after this conversation he saw Hinton in Ontario and opened negotiations for the sale of the sheep. Adrian asserts that he told Hinton that he could get 400 head of sheep from Roethler and that Hinton said that he would take the sheep if they could be purchased for $14.50 per head. Adrian stated that he then told Hinton that he would telephone to Roethler and ascertain whether the latter still had the sheep and whether he would "take that price." According to the testimony of Adrian, he told Roethler when talking over the telephone, that the plaintiffs would take the sheep but that

"I would assume no obligations whatever, because, not knowing the ewes, I would sell them no other way except Mr. Roethler would be party of the first part, and that I would sign his name to the contract, and making him the party of the first part. He said it would be all right, to go ahead and sell the stuff for him. * * Mr. Roethler stated to me over the telephone it would be all right to sell the stuff acting as his agent, which I had done at other times, not for him, but oftentimes for other people."

Hinton stated that when Adrian came out of the telephone office he said: "I talked to Amos and it is

all right"; and that they then went to the bank and drew up the written agreement. When the writing was signed the plaintiffs made a partial payment of $400. This partial payment was made in the form of a check which was drawn in favor of Adrian who explained to Hinton that Roethler "is owing me money and I will make it right with him, I will give him credit on the amount he owes me."

Prior to July 28, 1917, Adrian had sold a large number of sheep to Roethler and about two weeks after July 28th Roethler settled for the sheep which he had bought from Adrian. In this settlement, according to the testimony of Adrian, Roethler was given credit for the $400 which had been paid to Adrian by the plaintiffs; and Adrian also testified, when referring to the agreement made with Hinton, that he told Roethler at the time of the settlement "of the contract being drawn, and exactly how it was drawn." Hinton testified that when dealing with Adrian on July 28th he understood that the latter was acting as the agent of Roethler and that he dealt with Adrian as such agent. Hinton also told the jury that he saw Roethler a few days before September 15th, the date specified in the contract as the time of delivery, and that they agreed to change the time for the delivery of the sheep to September 21st, and to change the place to Juniper Springs.

Roethler caused about 525 head of sheep to be driven to Juniper Springs on September 21, 1917. Hinton went to Juniper Springs for the purpose of receiving the sheep, but upon examining about 150 head found that the sheep did not meet the requirements of the contract and rejected them. It is not contended by either of the defendants that the sheep

driven to Juniper Springs met the requirements of the writing signed on July 28, 1917.

Roethler testified in substance, that he never at any time authorized Adrian to act as his agent; and he also denied that he gave Adrian authority to sign his name when talking with Adrian over the telephone on July 28th. Frank Oxman was in charge of the sheep which were driven to Juniper Springs. When Hinton examined these sheep at Juniper Springs he exhibited the written contract to Oxman and the latter made a report to Roethler of what occurred. Roethler says that the first information he had about the written contract was when Oxman told him of having seen the writing at Juniper Springs. In brief, Roethler stated that he agreed to sell the sheep to Adrian and that he understood that Adrian in turn contracted to sell the sheep to the plaintiffs. Roethler explained to the jury that about two weeks after he had agreed to sell the sheep to Adrian the latter told him "Hinton will receive the ewes; I sold them to Hinton and Hinton will receive the ewes from you."

The plaintiffs claim that the defendant Adrian is individually liable on the contract for the reason that he adopted the contract by himsef agreeing to deliver the sheep. The record discloses that at different times subsequent to September 22d, Hinton talked with Adrian and that he also had several conversations with Roethler. Hinton testified that in one of his conversations with Adrian "in regard to fulfilling this contract" Adrian "said he would furnish me other sheep." When asked to give a full explanation of what Adrian said about being willing to turn over other sheep Hinton testified as follows:

"I went to Mr. Adrian, I says, 'Mr. Roethler is not going to fill that contract.' He says, 'Mr. Hinton, we have dealt a good deal; I don't want to change our

past relations. I have got some sheep I think will fill the bill, and I will let you have them.' "

The following is taken from the cross-examination of Hinton.

"Q. Isn't it a fact, Mr. Hinton, that Mr. Adrian told you that he would try to get sheep like those in the contract for you?

"A. No, sir.

"Q. O, he didn't offer them to you, he just said he would try to get them?

"A. He just said he would try to get them for me, and try to get them for me in good faith to me for what was going on."

1, 2. This litigation presents some features which are somewhat novel on account of the relative positions taken by the respective litigants. The plaintiffs claimed that both defendants were liable on the writing; that Roethler was bound by his agent; and that Adrian became obligated by what he said after the attempted delivery at Juniper Springs. Roethler contended that he never authorized Adrian to act for him. Adrian asserted that he had been authorized to act for Roethler. Each defendant gave testimony which was designed to strengthen his own position as well as to weaken the position of the other defendant. At the close of the plaintiffs' case, each defendant moved for a judgment of nonsuit; but both motions were overruled. Roethler contends that when his motion was made and overruled there was no evidence whatever to show that he had authorized Adrian to act as his agent. Even though it be assumed, without deciding, that there was no evidence at all upon the subject of agency when the plaintiffs closed their case in chief, yet any error committed by the court in overruling the motion was cured and Roethler cannot now complain if any of the parties afterward introduced

evidence from which the jurors were entitled to find that Adrian's acts were authorized or ratified by Roethler: *Roundtree* v. *Mount Hood R. R. Co.*, 86 Or. 147, 151 (168 Pac. 61). The record contains evidence which tends to show not only that Roethler authorized Adrian to sign the writing as his agent but also that he afterwards ratified all that had been done by Adrian as his agent. Whether Adrian was in truth authorized and whether Roethler did in fact ratify what had been done by Adrian were questions of fact to be decided by the jury and not by the court: *Anderson* v. *Adams*, 43 Or. 621, 633 (74 Pac. 215).

3. Immediately after all the parties had completed the introduction of all their evidence the court granted Adrian's motion for a directed verdict. Roethler asserts that "if the court was right in granting the motion of Adrian" his evidence "should not be considered." This argument is based upon the contention that Adrian's agency could not be proved by his testimony. This notion though expressed with surprising frequency is without authoritative support; for, to repeat what was said in *Larkin* v. *Carstens Packing Co.*, 80 Or. 104, 106 (156 Pac. 578):

"The right to prove a parol agency by testimony of the person who claims to be the agent is not even open to debate."

4. In instruction No. 5 the court told the jury that the complaint "is based upon an alleged contract which was alleged to have been made by Adrian on behalf of the defendant Amos Roethler, whereby the defendant agreed to deliver sheep" to the plaintiffs. Roethler insists that

"This is an incorrect statement because there is nothing said in the complaint to show that plaintiffs claimed that Adrian was an agent for Roethler."

Under an allegation that Roethler agreed to sell 400 head of sheep the plaintiffs could prove that the agreement was made by Roethler in person, or by his authorized agent, or by one whose acts, though not previously authorized, were afterward ratified; for the reason that in the final analysis it is Roethler who agrees to sell the sheep: *Masters* v. *Walker,* 89 Or. 526 (174 Pac. 1164).

The charge to the jury embraced 15 instructions. The first 7 are the only ones claiming our attention; for instruction No. 8 merely states the rule measuring damages and instructions Nos. 9 to 15 inclusive consist of the statutory instructions given in all civil actions. Instruction No. 1 informs the jury that "the plaintiffs seek to recover from the defendant" $400 "paid on a contract" and $1625 "damages for defendant's alleged wrongful breach of a contract." Instruction No. 2 directs the jury to return a verdict for Adrian. Instruction No. 4 need not be noticed. The inquiry is now narrowed to instructions numbered 3, 5, 6 and 7.

5, 6. Instruction No. 6 follows:

"The question, plainly stated, gentlemen, in this case is whether that contract was made by J. B. Adrian on behalf of Amos Roethler. If it was, and you further find that there was a breach of that contract, then you should find for the plaintiff in the amount that you may think he is entitled to under the evidence in this case."

The question in this case involves something more than whether the writing of July 28, 1917, was made by Adrian "on behalf of" Roethler. The important question is whether Roethler authorized Adrian to make "that contract" or ratified it after it was signed. Instruction No. 6 was equivalent to telling the jury that if the writing was signed "in the name of" or "for

the benefit of" Roethler, he would be liable. That the writing was signed by Adrian "in the name of" Roethler is proved conclusively, and that it was made by Hinton and Adrian for Roethler's benefit was likewise established; and yet Roethler could not be held liable unless he previously authorized or subsequently ratified Adrian's acts. Instruction No. 7 contains the same fault found in the preceding instruction, because the court said:

"If you find that this contract was made by Adrian in behalf of Roethler, you should find for the plaintiff at least in the sum of $400."

It is true that each instruction should be viewed in connection with the remaining instructions and the instructions should be considered as a whole; and therefore instructions Nos. 6 and 7 might possibly be deemed innocuous if the crucial question involved in the litigation had been made unmistakably plain to the jury. The fault inhering in instructions Nos. 6 and 7 is enlarged instead of diminished if we consider them in connection with instruction No. 3, which in effect advises the jury that Adrian was Roethler's agent. Instruction No. 3 reads as follows:

"When a contract is entered into by an agent on behalf of his principal and the name of the principal is disclosed and signed to the contract, recovery cannot be had against the agent on that contract. For that reason the defendant, J. B. Adrian has been discharged from this case. You shall therefore return that verdict, as I have directed you, in regard to J. B. Adrian."

The remaining instruction is No. 5. It opens by stating that the complaint is based upon an alleged contract claimed to have been made by Adrian "on behalf of" Roethler; and then the instruction continues thus:

"If you find in this case by a preponderance of the evidence, that this contract was entered into by J. B.

Adrian on behalf of Amos Roethler as his authorized agent, and further find that the contract was broken, then it would be your duty to find for the plaintiffs against the defendant, Amos Roethler, in such amount as you might determine his damages to be."

Instruction No. 5, considered as a whole, is unobjectionable and yet its merits do not cure the faults in instructions Nos. 3, 6 and 7. If the words "as his authorized agent" had been inserted after the word "Roethler" in instructions Nos. 6 and 7, as they were in instruction No. 5, then instructions Nos. 6 and 7 would have been harmless. Were Adrian's acts either authorized or ratified by Roethler? is the vital question; for the answer to that question determines this lawsuit; and upon a retrial this outstanding feature of the controversy should be made plain to the jury.

7–9. The court properly directed a verdict for Adrian. The complaint alleges that both defendants entered into a written contract in July, 1917, to deliver 400 head of sheep at Juntura on September 16, 1917. The writing dated July 28, 1917, upon which the plaintiffs rely, is, if a contract at all, the contract of Roethler alone. If Adrian was authorized to sign the writing then he is not personally liable to the plaintiffs for any breach of the contract: *Stewart* v. *Perkins,* 3 Or. 509; 2 C. J. 812. Adrian could have been made personally liable, if appropriate language had been employed in the writing; but the writing does not disclose an intention to add Adrian's personal liability to that of Roethler, and hence if Adrian was authorized to sign the writing Roethler alone is liable. If Roethler neither authorized nor ratified Adrian's acts then Adrian would of course be liable on his implied warranty that he was an authorized agent: *Cochran* v. *Baker,* 34 Or. 555, 563 (52 Pac. 520, 56 Pac. 641); *Anderson* v. *Adams,* 43 Or. 621, 626 (74 Pac.

215); *Sorenson* v. *Kribs*, 82 Or. 130, 135 (161 Pac. 405); but the pleading relied upon by the plaintiffs here does not charge this sort of liability. Assuming, without deciding, that the statements made by Adrian about trying to procure other sheep amount to a contract, nevertheless the plaintiffs would not be entitled to a judgment against Adrian in this action. These statements attributed to Adrian were made in October, 1917, and, if they can be said to have created a binding obligation, the result was a new contract. The only alleged contract mentioned in the complaint is the one claimed to have been made in July, 1917.

The evidence introduced and relied upon by Roethler and Adrian was admissible under their general denials: 31 Cyc. 1635; 2 C. J. 912, 917.

The judgment of the Circuit Court is affirmed as to Adrian; but as to Roethler the judgment is reversed and the cause remanded for a new trial.

AFFIRMED AS TO ADRIAN. REVERSED AS TO ROETHLER.

Argued October 1, affirmed October 25, rehearing denied December 3, 1918, motion for *nunc pro tunc* order denied January 7, 1919.

AHONEN *v.* HRYSZKO.*

(175 Pac. 616; 177 Pac. 63.)

Appeal and Error—Review—Evidence.

1. It is the function of the jury to determine the credibility of the evidence, a matter with which the Supreme Court cannot concern itself.

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*On the question of negligence of child injured by automobile in street, see note in 51 **L. R. A. (N. S.)** 1008.

As to when question of contributory negligence of child is for the jury, see note in 17 **L. R. A.** 79.

On the negligence of child in running in front of automobile in street, see note in 26 **L. R. A. (N. S.)** 435. REPORTER.

Municipal Corporations—Use of Streets—Injuries—Negligence and Proximate Cause—Questions for Jury.

2. In an action for injuries to five-year old boy, struck by automobile in crossing street, whether defendant was negligent, and whether such negligence was proximate cause of injuries, *held* for jury.

Evidence—Expert Opinion—Medical Testimony.

3. In action for injuries, testimony of doctor that skull consists of two tables of bone, with spongy bone between them, and that fracture might extend farther on inside than on outside, was proper expert testimony.

Appeal and Error—Harmless Error—Evidence.

4. In an action for injuries, any error in admission of medical testimony as to composition of skull *held* rendered harmless by witness' assurance he did not know whether or not particular fracture extended into motor area of brain.

Municipal Corporations — Injuries from Automobile — Contributory Negligence—Question for Jury.

5. In action for injuries to five-year old boy when struck by automobile in crossing street, whether child's acts constituted contributory negligence *held* for jury.

Trial—Instruction—Evidence.

6. In action for injuries to five-year old boy, struck by automobile while crossing street, where defendant stated he saw the child, instruction hypothesizing fact defendant did not see him was properly refused.

Municipal Corporations—Injuries by Automobile—Negligence.

7. Mere fact that automobile driver keeps within statutory speed limit does not absolve him from charge of negligence in striking child, who attempts to cross street before him.

[As to municipal regulation of automobiles with respect to use of equipment, use of streets and the like, see note in **Ann. Cas. 1916E, 1047.**]

Damages—Personal Injuries—Future Damages.

8. Plaintiff need not prove the future effect of his personal injury beyond a reasonable doubt, but only to a reasonable certainty, which is not negatived by a mere possibility of plaintiff's not suffering any future damages.

ON MOTION.

Appeal and Error—Disposition—Final Judgment.

9. The judgment of the supreme court is final when the opinion is handed down.

Appeal and Error—Disposition of Cause—Nunc Pro Tunc Order.

10. Supreme Court, after having examined Circuit Court's judgment and entered judgment against appellant and his sureties in accordance with section 559, subdivision 4, L. O. L., will not, upon subsequent death of one of the sureties, direct lower court to enter

judgment against sureties upon appeal bond *nunc pro tunc* as of the date of the decision affirming judgment; its function having been exhausted upon affirmance of judgment.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 1.

This is an action to recover compensation for personal injuries. The complaint alleges that the plaintiff, a child of the age of five years at the time of the accident, was crossing Mississippi Avenue at its intersection with Fremont Street, in the City of Portland, and that the defendant, being the owner of a certain automobile, negligently drove the car against and upon him, causing the injuries of which complaint is made. It is charged that the defendant was negligent in several particulars, among which are, that he was driving the vehicle at a rate of speed in excess of twenty miles an hour, that he was driving at a greater speed than was reasonable and proper, that he did not slow down on approaching the intersection of the streets, that he did not sound any warning or signal, that he failed to steer the car in such a manner as to avoid the injury, and that he was traveling on the left side of the street.

The answer admits that the plaintiff was only five years of age; admits the collision and injury, and denies all of the allegations of negligence, and averments relating to plaintiff's right to recover. It is then affirmatively asserted that defendant was traveling at a speed not exceeding eight miles per hour, sounding the horn at proper intervals, and in full compliance with the ordinances and traffic regulations of the City of Portland, and that at or near the intersection of the two streets, the plaintiff crossed Mississippi Avenue in front of the automobile, and after he had crossed in front thereof, and was clear of the car, suddenly and without warning to defendant, he turned back to recross the street, and instantly ran in front of the car

and collided with it. It is also averred that the injury was the result of a pure accident and was unavoidable.

A reply joined issue with the affirmative answer, and a trial to a jury was had, resulting in a verdict and judgment for plaintiff, and defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George Arthur Brown.*

For respondent there was a brief over the names of *Mr. R. R. Giltner* and *Mr. Edward J. Brazell,* with an oral argument by *Mr. Giltner.*

BENSON, J.—1, 2. Defendant argues that the trial court should have granted his motion for a judgment of nonsuit at the conclusion of plaintiff's case, and that it was also error to deny his motion for a directed verdict. These two assignments of error may properly be considered together, since each constitutes a demurrer to the evidence. This brings us to a consideration of the testimony in the case. It is agreed that the defendant was traveling in a northerly direction on Mississippi Avenue, while the plaintiff and his seven-year old sister were walking east on Fremont Street. Albert Kosciolek testifies that he saw plaintiff and his sister at the curb of the northwest corner of the intersection of the two streets; that the girl stood on the curb, while the boy ran across the street; that the girl screamed for him to come back, and then while running back to the west side of the street he was struck by the automobile; that the auto was going fast; that it was going at the rate of fourteen or fifteen miles an hour; that the rear end of the car was fifteen feet beyond the boy when it stopped. He also says that defendant did not sound his horn, or give any warning

signal; that when defendant's car reached the intersection of the two streets he put on his brakes and the car skidded over to the other side and struck the boy. Lena Rose testifies that when defendant reached the intersection he was traveling on the west, or left side of the street. The defendant himself testifies that he saw the children in the street while he was still sixty or seventy feet from them. As to the credibility of this evidence we cannot concern ourselves; that is the function of a jury, and if they believed these witnesses, they might very properly have found that the defendant was negligent and that such negligence was the proximate cause of the injury. The motions for nonsuit and a directed verdict were therefore properly denied.

3, 4. It is next urged that the court erred in admitting certain testimony of Dr. F. S. Tucker, as follows:

"Q. Do you know whether or not it [the fracture] extended into the motor area of the brain?

"A. Well, it was pretty close to the motor area, and sometimes you have a fracture of what is called the inner table of the skull, which does not show on the outside. That is the skull consists really of two layers of bone, of the spongy portion between, and it is impossible to tell sometimes how far the fracture of the inner table—

"To which question and answer, defendant by his counsel objected as follows:

"Mr. Brown: I object to this as to what might possibly be underneath. I object to the witness testifying to anything he does not know.

"The Court: Objection overruled. Exception allowed.

"To which the witness answered:

"A. To explain to you, the skull consists of two tables of bone with a spongy bone between the two. And sometimes a fracture may extend further on the

inside than it does on the outside. Of course a fracture of that kind cannot always be seen.

"The witness further said (page 35, Tr.) that he did not know whether the fracture extended into the motor area of the brain."

This appears to us to be clearly within the realm of proper expert testimony, and if it were otherwise, the error was rendered harmless by the witness' assurance that he did not know whether or not the fracture extended into the motor area of the brain.

5. The remaining assignments of error for which defendant contends, involve the subject of the court's refusal to give to the jury three instructions which were requested by him. The first of these reads as follows:

"2. If the evidence shows that just prior to the accident the plaintiff in company with his sister crossed the street in front of the defendant's automobile, you may find in view of all the circumstances that such crossing was as a matter of fact or in effect a warning to the plaintiff the danger of recrossing said street without first looking to see if any vehicles were approaching, and if the plaintiff suddenly turned without warning, and apparently without looking, or heeding if he did look, and ran directly in front of the defendant's automobile in an attempt to recross said street, he would then be guilty of such contributory negligence as would preclude him from a recovery even though the defendant were also negligent, and your verdict should be for the defendant."

This instruction seeks to impose upon the court the burden of saying, as a matter of law, that a certain series of facts, in the given case, would constitute contributory negligence. It must be remembered that the plaintiff was a child, only five years of age. The case of *Wallace* v. *Suburban Ry. Co.*, 26 Or. 174 (37 Pac. 477, 25 L. R. A. 663), was a personal injury case

wherein a child six years old was run over and killed by a street-car, and in that instance, Mr. Chief Justice BEAN, speaking for the court, says:

"If we assume that it can be asserted, as a proposition of law, that a child of the age of the deceased is *sui juris,* so as to be chargeable with negligence, the law is not so unreasonable or unjust as to require of it the same degree of reason and consideration in avoiding the consequences of the negligence of others that is required of persons of full age and capacity, and it should be left to the jury to determine whether the child in attempting to pass in front of the car, acted with that degree of care and prudence which might reasonably be expected, under the circumstances, of a child of her age and capacity. She was lawfully in the street, and was as much entitled to use the crossing as the defendant corporation. In attempting to do so she was run over and killed by the car of the defendant, running at an excessive and dangerous rate of speed. The negligence of the defendant must, therefore, be assumed, and it was for the jury to judge whether the child's conduct in attempting to cross the track in front of the approaching car without looking or listening, was characterized by any want of that degree of care which could reasonably have been expected of a child of her age."

This doctrine has been approved by this court in *Schleiger* v. *Northern Terminal Co.,* 43 Or. 4 (72 Pac. 324), and it follows that the request was properly refused.

6, 7. The next request which was denied by the court was an instruction in this language:

"3. Even if the plaintiff, a child of immature years, proceeding in reckless haste, however natural to his age, should suddenly and unexpectedly run or throw himself in front of the defendant's automobile while in motion, and such motion was not exceeding the speed limit, the driver of the car not seeing him, or in the

exercise of ordinary care not having time to stop the car before colliding with him, it is obvious that the plaintiff's own act is the sole cause of the injury; and, even though he may be entirely free from blame, the most that can be said in his favor is that the case is one of unavoidable accident, and the owner of the car is no more responsible for plaintiff's injury than would have been the owner of a wall against which the plaintiff had thoughtlessly thrown himself."

This statement of the law is subject to two criticisms. In the first place, the record is not only destitute of evidence tending to prove that defendant did not see the child, but the defendant himself says that he did see him. The other objection lies in the erroneous suggestion that keeping within the statutory speed limit would absolve the defendant from a charge of negligence. The instruction was properly rejected.

8. It is also urged that error was committed in refusing to instruct the jury as follows:

"4. If the plaintiff can recover at all he can recover only for his actual damages, and for such future damages as the evidence makes reasonably certain will necessarily result from the injuries sustained. Reasonable probability of future damages is not sufficient. It must be reasonably certain, and if there is any possibility of the plaintiff not suffering any future damages you cannot assess any damages for such prospective damage, or damage that is liable to occur."

The vice of this statement is contained in this sentence:

"It must be reasonably certain, and *if there is any possibility of the plaintiff not suffering any future damages*, you cannot assess any damages for such prospective damage, or damage that is liable to occur."

Such an interpretation would require the plaintiff to prove the future effect of a personal injury beyond a

reasonable doubt, which is not the law. Mr. Sedgwick, in his work on Damages, Volume 1, Section 172, says:

"The reasonable certainty required, however, does not mean absolute certainty, but reasonable probability."

The refusal of this request was not error.

The judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Motion denied January 7, 1919.

ON MOTION FOR NUNC PRO TUNC ORDER.

(177 Pac. 63.)

PER CURIAM.—From a judgment of the Circuit Court against him the defendant appealed, giving an undertaking for a stay of proceedings, conditioned in effect that if the judgment should be affirmed the appellant would satisfy it so far as affirmed: Section 551, subd. 1, L. O. L. On October 25, 1918, the judgment of the Circuit Court was in all things affirmed and judgment here entered against the appellant and his sureties, in accordance with Section 559, subdivision 4, L. O. L. A petition for rehearing was filed and overruled. On December 4, 1918, the attorneys for the plaintiff and respondent by motion suggested that since the decision affirming the judgment of the Circuit Court one of the sureties on the appeal bond had died, upon which basis the plaintiff moved, "that this court in its mandate to the Circuit Court of Multnomah County, Oregon, direct said Circuit Court to enter judgment against the sureties upon the appeal bond on this ap-

peal, *nunc pro tunc* as of the date of the decision of this court affirming the said judgment."

9, 10. As ruled in *Zeuske* v. *Zeuske,* 55 Or. 65, 87 (105 Pac. 249, 103 Pac. 648, Ann. Cas. 1912A, 557), the judgment of the Supreme Court is final when the opinion is handed down. At the time of our decision of this case all the parties, including the sureties, were alive and subject to the jurisdiction of this court, but as this is a tribunal of only special and limited authority, that is, only with power to affirm, modify or reverse the judgment of the Circuit Court in an action at law, our function was exhausted when we affirmed the judgment. We cannot presume in advance that the Circuit Court will act erroneously in the proceeding as of course yet to be taken before it. If any substitution is necessary, it can be worked out in that court and we must presume that the action to be taken there will be regular. Any direction of ours in advance would be gratuitous. The doctrine of substitution of parties was examined in *Service & Wright Co.* v. *Sumpter Valley Ry. Co.,* 88 Or. 554 (171 Pac. 202), with the result that it was there held that this court can substitute parties only for the purposes of its own jurisdiction, and if any further proceeding is required before the Circuit Court additional substitution must be accomplished there.

For these reasons the motion to direct the Circuit Court in advance to render a particular judgment must be denied.

MOTION DENIED.

Argued November 27, affirmed December 10, 1918, rehearing denied January 7, 1919.

MASSEY *v.* BECKER.*

(176 Pac. 425.)

Sales—Rescission by Seller—Action for Money Paid by Buyer.

1. When a seller abandons his contract to sell, the buyer, in his choice of remedies, may elect to rescind the contract and maintain an action at law to recover what he has paid thereon as money had and received.

Sales — Payment in Installments — Acceptance of Payments After Default—Election.

2. Where contract of sale provides for payments in installments, and stipulates that for default as to any the seller shall have the right to declare forfeited all payments made, acceptance of payment by seller after buyer is in default is waiver of right to declare forfeiture and election to consider contract in force.

Sales—Notice of Rescission by Seller.

3. Where contract of sale provides for payment in installments and stipulates that for default as to any the seller shall have the right to declare forfeited all payments made, the seller has no right to forfeit except after notice and allowance of reasonable time to comply with the contract.

[As to lien of vendor of personalty, see note in 83 **Am. St. Rep.** 451.]

Sales—Wrongful Rescission by Seller—Assent by Buyer—Effect.

4. When seller wrongfully attempted to rescind, having elected by acceptance of a payment after buyer's default to consider contract still in force, buyer had the right to assent to such rescission, thereby accomplishing it by mutual consent.

Sales—Rescission by Agreement—Restoration of Status Quo—Recovery by Buyer.

5. Where buyer and seller both consented to rescission, neither can base claim thereon except in so far as it is necessary to restoration of the *status quo;* rescission by mutual agreement ending contract.

Sales—Recovery of Price by Buyer—Rescission.

6. Where sale contract is rescinded by mutual consent, the buyer may recover back what he has paid.

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*On recovery back of money paid on rescission or abandonment of contract, see note in 30 **L. R. A.** 50.

On acceptance of portion of installment as affecting right to rescind continuing contract, see note in 21 **L. R. A. (N. S.)** 864.

On duty to place other party in *status quo* on rescission of contract, see note in 30 **L. R. A.** 44. REPORTER.

Pleading—Reply—Departure from Complaint.

7. In action by buyer to recover what he had paid on contract wrongfully rescinded by seller, buyer's reply to seller's answer setting up rescission, denying that time was of the essence, and alleging the seller wrongfully renounced and abandoned, was not a departure from complaint.

From Multnomah: HARRY H. BELT, Judge.

Department 2.

This is an appeal by the defendant from a judgment of the Circuit Court in favor of plaintiff. The cause was tried by the court without the intervention of a jury. The complaint alleges in substance that on and between the eighteenth day of March and the twenty-sixth day of May, 1915, the defendant had and received from the plaintiff to his use and benefit the sum of $168, and alleges a demand and failure to pay. The answer admits the complaint in part and denies a part thereof, and affirmatively alleges that about the eighteenth day of March, 1915, plaintiff entered into a contract with defendant to buy an automobile for the sum of $450;—$100 to be paid in cash;—$100 within forty-five days therefrom; and the balance of the purchase price, $250, at the rate of $40 per month; title to the property to remain in defendant until the purchase price was fully paid, and alleges that time was of the essence of the contract. That if payments were not made promptly when due, defendant should have the right to cancel the contract and retain the amounts paid thereon as liquidated damages. That plaintiff made the following payments only: March 18, 1915, $100; May 10, 1915, $30; May 17, 1915, $16; May 28, 1915, $22. All of which should have been paid on or before the 5th day of May; that on July 29th, defendant declared the contract forfeited and canceled the same on account of nonpayment.

The plaintiff replied denying that time was of the essence of the contract, and setting forth the contract substantially as in defendant's answer, and averring that the defendant accepted the sum of $68, paid on the dates named in May, 1915, after the same became due according to the terms of the contract, and that defendant wrongfully renounced and abandoned the contract while the same was in full force and effect; that plaintiff thereupon assented to said rescission of the contract by defendant and demanded repayment of the sums paid by plaintiff. The defendant demurred to the complaint and filed a motion for judgment on the pleadings contending that the complaint and the reply taken together do not show that the plaintiff is entitled to a judgment. The court made findings of fact in substance as alleged in plaintiff's reply in part as follows:

"That on July 29, 1915, and while said contract was in full force and effect, defendant, by reason of plaintiff's alleged default in the full payment of said installment due under said contract on May 3, 1915, repudiated, rescinded and abandoned said contract. That plaintiff thereupon assented to said abandonment and rescission by defendant of said contract, and demanded from defendant the repayment of all sums paid by plaintiff to defendant under said contract, to wit, $168; but that defendant refused, and still does refuse, to repay said sum or any part thereof."

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Cicero M. Idleman.*

For respondent there was a brief and an oral argument by *Mr. F. E. Swope.*

BEAN, J.—1. It is also contended on behalf of defendant that the reply is a departure from the com-

plaint and therefore the defendant's motion for judgment should have been allowed. The matter as presented practically involves but one question, whether or not the plaintiff is entitled to recover upon the facts as alleged by him and as found by the trial court. It is a well-settled rule of law that when a vendor abandons his contract to sell, the vendee in his choice of remedies may elect to rescind the contract and maintain an action at law to recover what he has paid thereon as money had and received: 27 Cyc. 867, 868; *Graham* v. *Merchant*, 43 Or. 294, 304 (72 Pac. 1088); *Maffet* v. *Oregon & California Railroad Co.*, 46 Or. 443, 457, 458 (80 Pac. 489).

2, 3. Where a contract of sale like the one in question provides for the payment of the purchase price in installments and stipulates that if any installment shall not be paid when due, the vendor shall have the right to declare forfeited all payments which have been made; the acceptance of a payment by the vendor after the vendee is in default is an election to consider the contract still in force. The acceptance by the defendant of the payments aggregating $68 after the $100 payment was due on May 5, 1915, was such an election, and while the plaintiff was in default under the waiver of the right to declare a forfeiture, the defendant vendor had no right to forfeit except after notice and after allowing plaintiff the vendee a reasonable time within which to comply with the terms of the contract: *Graham* v. *Merchant*, 43 Or. 294 (72 Pac. 1088).

4. When the defendant wrongfully attempted to abrogate and rescind the contract, the plaintiff had the right to assent to such rescission, thereby accomplishing the same by mutual consent: 2 Parsons on Contracts, § 678; 13 C. J., § 624, p. 601; *Woodard* v.

Willamette Valley Irrigated Land Co., 89 Or. 10 (173 Pac. 262).

5–7. The plaintiff and defendant both having consented to a rescission of the contract, neither can base a claim thereon except in so far as is necessary to the restoration of the *status quo*. It is the rule that when a contract of sale has been rescinded by the mutual assent and agreement of the parties, the contract is at an end, and in the absence of an agreement to the contrary, the vendee not being at fault may recover back the money paid on his contract: 2 Black on Rescission, 535; 2 Warvelle on Vendors, § 826; 13 C. J., § 627, p. 602. While the plaintiff by his reply sets forth the contract made between the parties and alleges that the defendant wrongfully rescinded the same, he does this in explanation of the facts alleged in the answer, and does not base his claim upon the contract, but alleges facts showing that it has been terminated and treats it as at an end, and asserts his claim for the amount paid thereon as money had and received which is in consonance with the above authorities. Therefore, the reply does not constitute a departure from the complaint: See *Mayes* v. *Stephens*, 38 Or. 512, 514 (63 Pac. 760, 64 Pac. 319); *Crown Cycle Co.* v. *Brown*, 39 Or. 285 (64 Pac. 451). Upon the facts stated in his pleadings and as found by the trial court, the plaintiff is entitled to recover.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

McBRIDE, C. J., and JOHNS and OLSON, JJ., concur.

Argued at Pendleton October 28, 1918, affirmed January 7, 1919.

STATE v. BUSICK.

(177 Pac. 64.)

Intoxicating Liquors—Sale—Indictment—Sufficiency.

1. Indictment under Laws of 1917, page 46, Section 1, amending Section 5, Laws of 1915, page 151, but leaving Sections 1–4 in full force, as to unlawful sale, etc., of intoxicants, *held* sufficient although particular liquor was not designated; such designation not being required in view of Laws of 1915, page 166, Section 33.

Criminal Law—Proof of Other Sales—Admissibility.

2. In prosecution under Laws of 1917, page 46, section 1, amending Section 5, Laws of 1915, page 151, for unlawful sale of intoxicants, evidence of other like sales was admissible in view of Laws of 1915, page 169, Section 39, to show character of business done by accused, etc.

Criminal Law — Witness Employed to Obtain Evidence — "Accomplice."

3. One employed to make purchase of intoxicants for purpose of appearing as witness against defendant was not an "accomplice," within Sections 1540, 2370, L. O. L., so that conviction could be had on his uncorroborated testimony; the crime being the sale and not the purchase.

[As to inducement to violate liquor law with view to prosecution therefor as defense to such prosecution, see note in Ann. Cas. 1916C, 732.]

From Union: JOHN W. KNOWLES, Judge.

In Banc.

On June 10, 1918, the defendant was indicted by the grand jury of Union County, charged with violation of the prohibition statute, in that he "did then and there wrongfully and unlawfully sell intoxicating liquor, by then and there selling to one William Wolf one pint of intoxicating liquor, receiving therefor $1.50, lawful money of the United States." The defendant demurred to the indictment upon the ground that:

"It does not state facts sufficient in law to constitute the crime charged, or any crime, or offense; nor does the indictment conform to the requirements of Chapter VII, Title XVIII, of the Code of Criminal Pro-

cedure of the State of Oregon, especially in not informing this defendant what particular character of intoxicating liquor is charged, whether beer, alcohol, whisky or other liquor."

The demurrer was overruled.

It appears from the record that the defendant was a druggist doing business in the town of Union; that the sale in question was of what is known as "Bitter Herb Tonic"; that the prosecuting witness, William Wolf, was employed by the office of the district attorney of Union County to make the purchase with a view of basing a criminal prosecution thereon and that pursuant to such employment he did make three separate purchases and then appeared as a witness before the grand jury which returned the indictment in question. The defendant was tried and convicted, and sentenced to pay a fine of $300, in default of which payment he should be confined in the county jail one day for each two dollars thereof, from which sentence he prosecutes this appeal.

There are numerous assignments of error, including the overruling of the demurrer to the indictment, the failure of the court to instruct the jury to return a verdict for the defendant, the giving of certain instructions and the refusal to give certain requested instructions. Further, it is claimed that the prosecuting witness, William Wolf, was an accomplice and that there was no corroborating evidence of the purchase made by him. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles H. Finn.*

For the State, there was a brief with oral arguments by *Mr. George M. Brown,* Attorney General, and *Mr. John S. Hodgin,* District Attorney.

JOHNS, J.—The indictment was found under Section 5, Chapter 40, page 46, Laws of 1917, which is in part as follows:

"Except as hereinafter provided in this amendatory Act it shall be unlawful for any person to receive, import, possess, transport, deliver, manufacture, sell, give away or barter any intoxicating liquor within this State; and the place of delivery of any intoxicating liquor is hereby declared the place of sale."

This section is an amendment to Chapter 141, page 150, Laws of 1915, but it leaves Sections 1, 2, 3 and 4 of the original Act of 1915 in full force and effect as follows:

"Section 1. This entire Act shall be deemed an exercise of the police powers of the State for the protection of the public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

"Section 2. The words 'intoxicating liquor,' as used in this Act shall be construed to embrace all spirituous, malt, vinous, fermented or other intoxicating liquors; and all mixtures or preparations reasonably likely or intended to be used as a beverage, which shall contain in excess of one half of one per centum of alcohol by volume, shall be deemed to be embraced within such term, independently of any other test of their intoxicating character; and all mixtures, compounds or preparations, whether liquid or not, which are intended, when mixed with water or otherwise, to produce, by fermentation or otherwise, an intoxicating liquor, shall also be deemed to be embraced within such term.

"Section 3. The term 'magistrate,' where used in this Act, shall mean any justice of the peace, district judge, county judge, judge of a municipal court, judge of a circuit or superior court, or any other officer authorized and empowered to exercise the powers of a justice of the peace or a magistrate as provided by the laws of this State.

"Section 4. The term 'prosecuting officer,' where used in this Act, shall mean any district attorney or deputy or assistant district attorney for any county or counties within his jurisdiction, or any prosecutor in any county for which he may be appointed or to which he may be assigned by the Governor for the purpose of enforcing any of the provisions of this Act."

Section 33 of the Act of 1915 provides:

"In prosecutions under this Act, whether begun by indictment, complaint or information, it shall not be necessary to state the kind or quantity of liquor manufactured or sold, and it shall not be necessary to describe the place where the same was manufactured or sold, except in prosecutions for the keeping and maintaining of a common nuisance as defined by this Act, or when a lien is sought to be established against the place where such liquor was illegally sold; and it shall not be necessary to state the name of the person by whom the same was manufactured or sold, nor to state the name of the person to whom the same was sold; and it shall not be necessary in the first instance, for the State to allege or prove that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions provided by this Act."

And in Section 39 we find:

"In any such prosecution evidence of other sales of intoxicating liquor at or about the same time by the same person or at the same place to other persons shall be admissible as tending to show the character of the business in which the defendant is engaged and the probability and credibility of such testimony as may be introduced of the particular sale or sales upon which the state shall rely for conviction."

1, 2. Under the provisions of these last two sections, we think the allegations in the indictment are sufficient and the evidence of other like sales was admissible.

The defendant claimed and undertook to prove that the "Bitter Herb Tonic" was a mixture or preparation sold by many druggists for medicinal purposes and that

it was not "reasonably likely or intended to be used as a beverage." He also claimed that it did not "contain in excess of one half of one per centum of alcohol by volume." Such questions were fairly submitted to the jury under proper instructions. The crime charged against the defendant is the sale of intoxicating liquor. The question as to whether the preparation sold was intoxicating or not, was also fairly submitted to the jury. The record shows that the prosecuting witness was employed to obtain the incriminating evidence against the defendant and that for such purpose only, he did within twenty-four hours make three distinct and separate purchases, each of one bottle of "Bitter Herb Tonic" at the price of $1.50 per bottle. The defendant admits the three separate sales, but claims that they were made in the regular course of his business as a druggist; that they were made as of a drug and not as of a beverage; that if there was any crime committed in such sales the prosecuting witness was an accomplice; that the latter's testimony is not corroborated and for such reason the court should have directed a verdict. That is the vital issue in this case.

Section 2370, L. O. L., provides:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

And Section 1540 provides:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances of the commission."

In *State* v. *Roberts*, 15 Or. 187 (13 Pac. 896), quoting from Wharton's Criminal Evidence, Section 440, this court said:

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime."

In *State* v. *Edlund*, 81 Or. 617 (160 Pac. 535), this court, speaking through Mr. Justice MOORE, said:

"The term, so far as involved herein, may be defined as follows: An accomplice is a responsible person whose willful participation in the commission of a crime, when that fact is established by competent evidence in a court of requisite jurisdiction, renders him liable to a conviction of the offense."

In Underhill on Criminal Evidence (2 ed.), page 120, Section 69, the author says:

"A person who, as a detective, associates with criminals or communicates with or aids them solely for the purpose of discovering commission of crime and procuring the punishment of the criminals is not an accomplice."

In Greenleaf on Evidence, Volume 1 (15 ed.), page 524, Section 382, this rule is laid down:

"There is one class of persons *apparently accomplices*, to whom the rule requiring corroborating evidence does not apply; namely, persons who have entered into communication with conspirators, but either afterwards repenting, or, having originally determined to frustrate the enterprise, have subsequently disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates until the matter can be so far advanced and matured, as to secure their conviction and punishment. The early disclosure is considered as binding the party to his duty; and though a great degree of objection or disfavor may attach to him for the part he has acted as an *informer*, or on other ac-

counts, yet his case is not treated as the case of an accomplice."

Rice on Evidence, Volume 3, page 525, lays down this rule:

"A policeman, by pretending to be an accomplice, may obtain access to a chamber where counterfeiting instruments are collected, but this does not prevent a conviction being rendered on his testimony. * *

"One of the most nefarious and infamous conspiracies ever known in this country—that of the 'Molly Maguires,' in 1876, to coerce by assassination the coal proprietors of the Pennsylvania anthracite region—was exploded, and the chief perpetrators brought to justice by the sagacity and courage of a detective who attended the meetings of the conspirators and thus became possessed not only of their plans for the future but of their exploits of the past. * *

"The fact that postoffice inspectors resorted to test or decoy letters in order to bring to justice a person suspected of using the mails for the circulation of obscene literature, does not operate to discredit their testimony upon the trial of that person for that offense."

Wigmore on Evidence, Volume 3, Section 2060, page 2756, states the rule thus:

"The case of a *pretended confederate,* who as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometimes be difficult of application. * * The line should perhaps be drawn in this way: When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offense, he is not an accomplice."

In 1 R. C. L., page 159, Section 6, it is said:

"Thus, for instance, a detective who, for the purpose of discovering crime, ostensibly aids in its commission or in a conspiracy to commit it, is not an accomplice whose testimony must be corroborated."

In *State* v. *Gibbs,* 109 Minn. 247 (123 N. W. 810), it is said:

"Moreover, according to the settled law of this state the fact that the officers purchased beer did not render them *particeps criminis.* Nor does the further fact that they were in pursuit of evidence against persons selling liquor contrary to law make them accomplices: *State* v. *Baden,* 37 Minn. 212 (34 N. W. 24). And to adopt the language of Mr. Justice BREWER, in *Grimm* v. *United States,* 156 U. S. 604, at page 610 (15 Sup. Ct. Rep. 470, at page 472, 39 L. Ed. 550): 'It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business': *Andrews* v. *United States,* 162 U. S. 420 (40 L. Ed. 1023, 16 Sup. Ct. Rep. 798), to which the defense refers us, tends, indeed to sustain this conviction. So in *Campbell* v. *Commonwealth,* 84 Pa. St. 187, the testimony of Detective McFarlan exposing the famous Molly Maguire conspiracy was received. The court, per STERRETT, J., held that: 'A detective who joins a criminal organization for the purpose of exposing it and bringing criminals to punishment, and honestly carries out that design, is not an accessory before the fact, although he may have encouraged and counseled parties who were about to commit crime, if in so doing he intended that they should be discovered and punished, and his testimony, therefore, is not to be treated as that of an infamous witness.' "

Harrington v. *State,* 36 Ala. 236, 242, holds:

"Lyon was certainly not an accomplice of the defendant in the act of selling. There was no community of purpose between them; the defendant not even being aware of Lyon's presence, nor in any degree influenced by it. The statutory offense consists in the act of selling, not in that of buying; and neither the purchaser, nor one participating in the purchase can be deemed an accomplice of the seller."

Enc. L. & P., Volume 1, page 553, thus lays down the rule:

"A person who feigns complicity in the commission of a crime, in order to entrap the accused, is not an accomplice."

We quote from 16 C. J. the following rules, which cite numerous authorities.

"*Feigned accomplice.* One who participates in a felony as a feigned accomplice, in order to entrap the other, is not criminally liable": Section 115, page 129.

"*Illegal sales.* The purchaser of articles sold in violation of the statute is not an accomplice of the seller, although he made the purchase for the special purpose of securing the conviction of the seller. This rule applies to the sale of intoxicating liquor, of lottery tickets, or of goods with counterfeit labels": Section 1386, page 681.

"*Feigned assistance.* One who for the purpose of securing evidence against the perpetrator of a crime feigns to aid him is not an accessory after the fact": Section 137, page 139.

"*Violation of Liquor Law.* It is very generally held that one who purchases intoxicating liquor which is sold in violation of law is not an accomplice of the seller": Section 1397, page 683.

3. The crime charged against the defendant is the sale of intoxicating liquor and the record is conclusive that the prosecuting witness was employed to make the purchase for the purpose of appearing as a witness against the defendant, but there is a very marked difference between the legal status and liabilities of a seller and those of a purchaser. While it is true that a sale cannot be made without a purchaser, it is also true that under the statute the crime is in the sale of intoxicating liquor and not in the purchase. The whole purpose and intent of the prohibition enactment was to prevent and punish the sale of intoxicating

liquor, and as it fails to make the purchase of such liquor an indictable offense, we hold that Wolf, as a purchaser, was not an accomplice of the defendant as a seller.

We have examined the remaining questions presented by the appeal, but the record shows that the defendant had a fair trial and the judgment of the Circuit Court is affirmed. AFFIRMED.

Mr. Justice HARRIS was not present at the hearing of this cause.

Argued October 15, affirmed November 19, 1918, rehearing denied January 14, 1919.

DOHERTY v. HAZELWOOD COMPANY.*

(175 Pac. 849; 177 Pac. 432.)

Trial—Direction of Verdict—Evidence.

1. A motion for a directed verdict must be overruled, and the question at issue must in the first instance be submitted to the jury, if there is any evidence which the jury is entitled to consider as against the moving party.

Master and Servant — Liability for Acts of Servant — Direction of Verdict.

2. Ownership of an automobile operated by an agent constitutes a *prima facie* case for the jury of the principal's liability for injuries inflicted by the agent in driving the machine of which he had general charge, although for a purpose of his own, in view of Section 796, L. O. L., authorizing an inference of fact to the be founded on the "course of business."

[As to liability of the master for acts and neglects of the servant done in the course of his employment, see notes in 55 **Am. Dec.** 317; 40 **Am. Rep.** 226; **Ann. Cas.** 1916A, 962.]

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*On the question of liability of owner of automobile when car is being used by servant or another for his own business or pleasure, see notes in 1 **L. R. A. (N. S.)** 235; 9 **L. R. A. (N. S.)** 1033; 14 **L. R. A. (N. S.)** 216; 21 **L. R. A. (N. S.)** 93; 26 **L. R. A. (N. S.)** 382; 33 **L. R. A. (N. S.)** 79; 37 **L. R. A. (N. S.)** 834; 47 **L. R. A. (N. S.)** 662; **L. R. A.** 1916A, 957. REPORTER.

Trial—Direction of Verdict—"Prima Facie Case."

3. In view of Section 793, L. O. L., and Section 868, subsection 2, whenever it is determined that a plaintiff has made out a *prima facie* case the court has no power to withdraw case from jury despite Sections 693, 797; a "*prima facie* case" being that state of facts which entitles the party to have the case go to the jury.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc.

The plaintiff, Mary Doherty, as the administratrix of the estate of her deceased husband, brought this action against the defendants, Hazelwood Company, a corporation, J. W. Shearer and E. J. Cashin, to recover damages for the death of her decedent which she alleges was caused by the negligent operation of an automobile owned by the company and driven and used at the time by the individual defendants in the interest of the corporation, with its consent and in furtherance of its business.

The Hazelwood Company contented itself with an answer denying all of the allegations of the complaint except that of its corporate existence. Each of the individual defendants answered separately in his own behalf, making some denials and urging affirmatively the defense of contributory negligence. After trial there was a judgment in favor of the plaintiff and against the company and the defendant Shearer. The company alone appeals, hence no further notice need be taken of the answers of the individuals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Bert W. Henry* and *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Harrison Allen.*

For respondent there was a brief over the names of *Mr. R. Citron* and *Mr. Henry E. McGinn,* with an oral argument by *Mr. Citron.*

BURNETT, J.—The only question presented in the brief of the company and argued in this court is the alleged error of the Circuit Court in refusing to instruct the jury to find a verdict in favor of the company. A *résumé* of the testimony therefore becomes necessary in order to determine whether upon the whole case as presented on the evidence the plaintiff was entitled to go to the jury.

The company was engaged in business in the City of Portland and was the owner of the automobile involved. Shearer was its employee whose daily hours of service began at 8 o'clock in the morning and ended at 6 o'clock in the evening, and whose duty it was to take the automobile during his working hours and visit tradesmen, to solicit business for the company. In addition to this he was permitted by the company to use it in going to his home after working hours, to keep it there overnight and to use it in returning to his service the following morning. The decedent was a street-sweeper in the employ of the City of Portland.

After his working hours the evening before the fatal accident, Shearer took his wife and rode in the automobile to a dancing party, remaining there until shortly after midnight. The car was one with but a single seat, ordinarily sufficient for but two passengers. When the party broke up, in pursuance of an arrangement made between three married couples, the Shearers, the Cashins and the Dunnes, Cashin and his wife, who had no car, were taken separately in the two cars operated by the other couples, Cashin going into the car with the Shearers, taking Mrs. Shearer on his lap. The latter three proceeded homeward, Shearer driving the car, and at the Broadway bridge ran upon Doherty, where he was engaged in street cleaning, dragging him

some distance up the approach of the bridge, and injuring him so that he died soon after.

1. Reduced to its lowest terms, the question presented is whether the court should direct a verdict in favor of the defendant company when there is testimony that the car which inflicted the injury upon the decedent was the property of the company, operated by one who was in its general employ daily using the car in the business of the company and in addition thereto having it under his custody and control outside of working hours, although there was direct evidence that he was using it for his private purposes at the exact time of the accident. It is axiomatic that a motion for a directed verdict must be overruled and the question at issue must in the first instance be submitted to the jury, if there is any evidence which the jury is entitled to consider as against the moving party. Questions analogous to the one here involved have been considered by this court in several cases, such as *Dalrymple* v. *Covey Motor Car Co.*, 66 Or. 533 (135 Pac. 91, 48 L. R. A. (N. S.) 424); *Smith* v. *Burns*, 71 Or. 133 (135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666, L. R. A. 1915A, 1130); *Kahn* v. *Home Telephone & Telegraph Co.*, 78 Or. 308 (152 Pac. 240); *Houston* v. *Keats Auto Co.*, 85 Or. 125 (166 Pac. 531); and lastly, *West* v. *Kern*, 88 Or. 247 (171 Pac. 413, 1050).

After a review of the authorities Mr. Justice HARRIS sums up the matter in *West* v. *Kern* in these words:

"We adhere towards the doctrine to which the opinion in *Kahn* v. *Home Telephone & Telegraph Co.*, 78 Or. 308 (152 Pac. 240), inclines, and which the opinion in *Houston* v. *Keats Auto Co.*, 85 Or. 125 (166 Pac. 531), pronounces, and we hold that proof of ownership makes a *prima facie* case against the owner."

He distinguished *Smith* v. *Burns*, 71 Or. 133 (135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666, L. R. A.

1915A, 1130), and laid it aside for the purposes of the there instant case, on the ground that the precise question of whether or not proof of the ownership of the automobile made a *prima facie* case was not discussed in the opinion.

2. The naked question is therefore presented here, whether ownership of the machine with which the injury was inflicted is sufficient to take the case to the jury as against the motion for a directed verdict. We remember that if the ultimate fact is that the car was operated solely for the private purposes of the driver without the knowledge or permission of the owner, the latter would be exempt from liability. The ascertainment of that ultimate fact, however, is for the jury and if there is any evidence in favor of the plaintiff the jury must receive the case in the first instance as against the motion for a directed verdict. This doctrine prevailed even before the adoption of the amended form of Article VII of the State Constitution forbidding re-examination otherwise of any question of fact determined by the verdict of a jury unless the court can affirm that there is no evidence to support it: *Serles* v. *Serles,* 35 Or. 289 (57 Pac. 634).

Certain rules of evidence are codified in our statutes. There is a classification of direct and indirect evidence embodied in Section 690, L. O. L. Again, indirect evidence is said to be of two kinds: 1, inferences, and 2, presumptions: Section 793, L. O. L. In the following section an inference is defined to be "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Again in the next succeeding section it is said: "A presumption is a deduction which the law expressly directs to be made from particular facts." In authorizing the jury by course of reasoning to make

a deduction, the law does not allow it to wander into the realms of fancy and speculation without restriction, for it is said in Section 796, L. O. L.:

"An inference must be founded,—

"1. On a fact legally proved; and,

"2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

Further, in Section 797, L. O. L.:

"A presumption, unless declared by law to be conclusive, may be overcome by other evidence, direct or indirect; but unless so overcome, the jury are bound to find according to the presumption."

We find it presumed in Section 799, subdivision 20, "that the ordinary course of business has been followed."

In our quest for evidence in favor of the plaintiff we discern proof that the defendant company owned the car; that it was in the custody of Shearer, who was in the general employ of the company; that while he was driving it the fatal accident occurred and that there was some evidence of his negligence in the matter. These facts satisfy the first element of the foundation of an inference, viz., "a fact legally proved." We pass then to the question of whether there is any element in the evidence satisfying the second requisite of the foundation of an inference as laid down in Section 797. We lay aside the deduction to be drawn from the consideration of propensities and passions of men and the course of nature, because these are manifestly not involved in the discussion. The only remaining element in the second requisite of the basis of an inference in the "course of business." Here was a transaction in which the property of the defendant company was in-

volved. There was something being done with that property by a person who was in possession of it by the company's consent. In a sense it amounted to the company's holding him out as its agent in the operation of the machine, so that his driving it at the time of the accident was in the apparent scope of his authority. Under these circumstances there comes into play the presumption, disputable it is true, that the ordinary course of business has been followed. In this manner is supplied the second element of the statutory basis of inference. From these premises the jury is authorized to reason and deduce the conclusion which supports the *prima facie* case delineated in *West* v. *Kern*. This inference is a piece of evidence, indirect indeed, but sanctioned by our Code. It is present in the case. It is a factor to be considered by the jury which alone has the right to adopt or to discard it. The trial court had no authority to ignore it, for the statute expressly says that the inference is a deduction to be drawn by the jury, thus classifying it as within the province of the jury, which the court has no right to invade when called upon to direct a verdict. It is not a case of founding an inference upon an inference, as condemned in *State* v. *Hembree*, 54 Or. 463 (103 Pac. 1008), and other precedents, for the jury is expressly commanded to find in accordance with the presumption unless it is overcome. There is nothing in the case to overcome the presumption except the oral testimony of the witnesses Shearer and Cashin, who of course declare that the machine was being used at the time for the private purposes of Shearer. Whether the presumption and its consequent inference are overcome by this oral testimony is for the jury, instead of the court, to determine in the first instance. We are bound to say that there was evidence

in the case, although of an indirect character, which the plaintiff was entitled to submit to the triers of the fact, as against the direct evidence of the defendant's witnesses. Thus it is written in the law which we have no authority to change, as against the contention that the court should have directed a verdict. Under the rules of evidence in the Code it is clear that there was testimony *pro* and *con* on the issue involved, the weight and preponderance of which was to be determined by the jury.

The analysis of the sections of the Code noted above as applied to the evidence supports the doctrine of *West* v. *Kern* to the effect that proof of the ownership of the automobile inflicting the injury in a negligent manner makes a *prima facie* case in favor of the plaintiff. The precept must therefore be reiterated. In the instant case it sustains the action of the court in refusing to direct a verdict. Other reasons for the rule are stated in our own precedents to which allusion has been made and need not be repeated here. The purpose of the present opinion is merely to point out statutory grounds for the conclusion that proof of ownership of a vehicle negligently operated to the injury of another makes a *prima facie* case in favor of the injured party. This disposes of the only question presented in the brief of the defendant company and argued at the hearing. It leads to an affirmance of the judgment of the Circuit Court. AFFIRMED.

JOHNS, J., Concurring Specially.—It appears from the record that J. W. Shearer was in the actual employ of the Hazelwood Company daily between 8 A. M. and 6 P. M.; that he was authorized by the company, after working hours to take, and that he did take the automobile to his own home, keep it there overnight and use it in returning to his labors the following morning. He

was therefore lawfully in possession of the machine, with the knowledge and consent of the Hazelwood Company, and the jury would have a right to infer that if he had authority to use it after working hours for one purpose he might have authority to use it for other purposes, and for such reason I concur in the opinion affirming the judgment. But where a third person has unlawfully obtained possession of an automobile from its owner and while in such unlawful possession he injures another with the automobile, notwithstanding the case of *West* v. *Kern,* 88 Or. 247 (171 Pac. 413, 1050), and the authorities cited in this opinion, I do not believe that the owner of the automobile should be held liable for the negligence of the third person who is in the unlawful possession of the automobile. Under such a state of facts, if the jury should return a verdict against the owner, in my judgment this court not only has the power but it would be its duty to set aside the verdict.

Denied January 14, 1919.

ON PETITION FOR REHEARING.

(177 Pac. 432.)

In Banc.

Messrs. Griffith, Leiter & Allen and *Mr. Bert W. Henry,* for the petition.

Mr. R. Citron and *Mr. Henry E. McGinn, contra.*

BENSON, J.—Counsel for defendant has presented a very vigorous and interesting brief upon its petition for a rehearing herein, urging that the *prima facie* case made by the plaintiff was so completely over-

whelmed by the direct evidence of reputable and credible witnesses that it was the duty of the trial court to direct a verdict in favor of the defendant. Throughout the entire argument, however, counsel appears to overlook the distinction between the functions of court and jury. Defendant concedes the settled doctrine, in this state to be that proof of ownership, possession and use of the automobile makes a *prima facie* case which must be squarely met by the defendant, but insists that, as a matter of law, the evidence of a number of reliable witnesses may be so convincing as to justify the court in directing a verdict. This contention is antagonistic to the logic of Section 793, L. O. L., declaring inferences and presumptions to be evidence, and Section 868, L. O. L., subsection 2 of which makes it the duty of trial courts to instruct juries

"'that they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence satisfying their minds.''

A *prima facie* case is that state of facts which entitles the party to have the case go to the jury: 6 Words & Phrases, 5549. Whenever, therefore, it is determined that a plaintiff has made a *prima facie* case, it has passed beyond the power of the court to withdraw the case from the jury. This conclusion is not in any manner affected by either section of the Code cited by defendant. Section 797, L. O. L., says, it is true, that a presumption "may be overcome by other evidence, direct or indirect," but the section continues by saying, "but unless so overcome, the jury are bound to find according to the presumption." Section 693, L. O. L., seeks merely to distinguish between direct and indirect evidence, and neither section under-

takes to impair the function of the jury in weighing the two classes of evidence and determining which is the more convincing.

The petition is denied.

AFFIRMED. REHEARING DENIED.

Argued at Pendleton October 28, affirmed November 19, 1918, rehearing denied January 14, 1919.

STATE v. GOODALL.*

(175 Pac. 857.)

Animals—Cruelty to Animals—Variance.

1. Where indictment framed under Section 2103, L. O. L., alleged cruelty, and further, that horse was unfit for riding, but failed to allege that defendant was owner as required under the second part of such section, and evidence showed defendant to be the owner and that he rode the animal while it had an ulcerated sore on its back, there was no variance; the two parts of the section not being in conflict.

Animals—Cruelty to Animals—"Torturing and Tormenting Animals."

2. The acts of riding a horse suffering with an ulcerated sore on its back and shoulders which fell under the saddle blanket, and of depriving the animal of necessary sustenance, constitute the crime of "torturing and tormenting" within Section 2103, L. O. L.

Witnesses—Impeachment—Prerequisites.

3. In prosecution for cruelty to a horse where a deputy who made the arrest had testified, accused was not entitled to show what he had made the deputy admit, certain things, without complying with Section 864, L. O. L., requiring the witness to be impeached to be asked whether he made the statement and be allowed to explain it.

Criminal Law—Harmless Error—Admitting Evidence—Unresponsive Answers.

4. In prosecution for cruelty to a horse, error, if any, in permitting the question to be asked how long defendant rode the horse, was harmless, where the answer was unresponsive so that the question was never answered.

From Union: JOHN W. KNOWLES, Judge.

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*On the question of cruelty to animals generally, see note in 41 L. R. A. (N. S.) 436. REPORTER.

In Banc.

The defendant was indicted for cruelty to an animal, and a trial was had resulting in a conviction from which he appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Eugene Ashwill* and *Mr. R. J. Green,* with an oral argument by *Mr. Ashwill.*

For the State there was a brief with oral arguments by *Mr. John S. Hodgin,* District Attorney, and *Mr.* George M. Brown, Attorney General.

BENSON, J.—The charging part of the indictment reads as follows:

"The said Scott Goodall, on the 6th day of January, 1918, in the County of Union, and State of Oregon, did then and there wrongfully and unlawfully torture, torment and deprive of necessary sustenance one certain animal, to wit, a gelding, by then and there saddling, riding and driving said animal while the same was afflicted with and suffering from a deep and ulcerated sore on its back, and a sore on its shoulder, and by so saddling, riding and driving said animal greatly aggravating said sores, and depriving said animal of sufficient food to keep the same in health or without suffering when driven or ridden, and then and there and thereby causing said animal great and excruciating pain and suffering, all contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

This indictment was framed upon the provisions of Section 2103, L. O. L., which comprises Sections 1 and 2 of an act of the legislature enacted in 1885, and found in the laws of Oregon for 1885, at page 45 thereof, which sections read as follows:

"Section 1. Whoever overdrives, or overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates, or cruelly kills, or causes or procures to be so overdriven or overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated or cruelly killed, any animal; and whoever having the charge or custody of any animal, either as owner or otherwise, inflicts cruelty upon the same, shall, for every such offense be punished by imprisonment in the county jail not exceeding sixty days, or by fine not exceeding one hundred dollars, or by both fine and imprisonment.

"Section 2. Every owner, possessor or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or cruelly abandons the same, or who carries the same, or causes the same to be carried in or upon any vehicle or otherwise, in a cruel inhuman manner, or knowingly or willfully authorizes or permits the same to be subjected to torture, suffering or cruelty of any kind, shall be punished for each and every offense in the manner provided in section (1) one."

There was evidence tending to prove that defendant was the owner of the horse, and that he rode the animal a distance of five or six miles on two different occasions at a time when it had an ulcerated sore on its back with an area of four by six inches, from which pus trickled down the sides of the beast, and that the saddle and the blanket underneath pressed upon the sore. Defendant contends that these facts, if proven, can justify a conviction only under Section 2 as quoted above, and that since the indictment is based upon the language of Section 1, and does not charge the defendant with being the owner of the horse, while it does charge the alleged cruelty as consisting in riding the

animal when it was unfit for labor, there is a fatal variance between the pleading and the proof.

1. The two sections of the statute, as we view them, are not in conflict, and the second section is not in any sense a limitation of the first. Both are comprehensive and general, and by the same specific acts it is possible to violate the provisions of both.

In *State* v. *Burwell,* 34 Kan. 312 (8 Pac. 470), the court says:

"And generally, we think, that wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense."

In *State* v. *Seward,* 42 Mo. 206, the court says:

"But the next question is, whether the indictment does not sufficiently set out an offense under the thirty-second section. It is immaterial what section was in the mind of the pleader when the indictment was drawn, or on what particular section he intended to base it, provided that a sufficient description is set out as to any offense created or recognized by the statute."

In *State* v. *Emerich,* 87 Mo. 110, the same court says:

"And there are cases where the pleader attempts to draft an indictment under one section, and blunders into another; in such case, the indictment may still charge an offense after rejecting surplusage."

2. The indictment in the present case charges that the defendant cruelly tortured and tormented the animal by riding it when it had a deep, ulcerated sore on its back, and by supplying it with insufficient food. The Standard Dictionary defines torture as "the act or operation of torturing; the infliction of or subjection to extreme physical pain." The same authority defines torment thus: "To subject to excruciating bodily

or mental suffering." It is clear that the act of riding a horse in such condition as that described in the indictment, and elaborated in the evidence, constitutes the crime of torturing and tormenting an animal, as is also the act of depriving the animal of necessary sustenance. Defendant's contention upon this point fails.

The only assignments of error not disposed of thus far, consist of challenges to the admissibility of evidence. The first of these is found on page 41 of the bill of exceptions, as follows:

"Q. Have you done everything in your power to remedy this sore?

"A. I have, and I made that deputy admit that it was—

"Mr. Hodgin.—We object to that.

"The objection is sustained as not responsive to the question.

"Q. What did the deputy admit?

"Objected to as incompetent, irrelevant and immaterial."

3. The objection was sustained and defendant excepted. It is now urged that the answer was admissible as an impeachment of the deputy who had been a witness. Section 864, L. O. L., discloses the only manner in which such evidence could have been made available for the purpose of impeachment, and it was not followed, so the objection was properly sustained.

4. The remaining assignment is disclosed by the bill of exceptions as follows:

"Q. And how long did you ride it after the cow?

"Objected to as incompetent, irrelevant and immaterial and not cross-examination."

The objection was overruled and an exception taken. The witness then replied:

"The sore was dry and painless at that time."

It is a sufficient response to this assignment, that the question was never answered, and therefore the ruling was harmless.

We find no error in the record, and the judgment is affirmed. AFFIRMED. REHEARING DENIED.

Argued at Pendleton October 28, reversed with directions December 17, 1918, rehearing denied January 14, 1919.

ROBISON *v.* OREGON-WASH. R. & N. CO.*

CLIFFORD, ADMR., *v.* OREGON-WASH. R. & N. CO.

(176 Pac. 594.)

Trial—Direction of Verdict—When Proper.

1. Verdict cannot be directed, if there is any evidence sufficient to be submitted to the jury on the issue involved.

Railroads — Crossing Accidents — Respective Duties of Railroad and Traveler.

2. The duty of the traveler to use reasonable diligence to avoid a collision at a crossing is as imperative as the duty of those who operate the train, with the qualification that the train has the right of way where the track intersects the highway.

Railroads—Crossing Accidents—Automobiles—Care Required.

3. An automobile being capable of control within narrow limits, the driver of an automobile, on approaching railroad crossing, must observe more particularly the rule to look and listen than must a driver of a team.

Railroads—Crossing Accidents—Duty to Look.

4. Failure of a person, about to cross a railway track on a highway at grade, to look and listen for an approaching train, is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing.

Railroads—Crossing Accidents—Duty to Look and Listen.

5. It is incumbent on an automobile driver, approaching a railroad crossing, both to look and to listen.

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*For a review of the question of care required of driver of automobile at railroad crossing generally, see notes in 21 **L. R. A. (N. S.)** 794; 29 **L. R. A. (N. S.)** 924; 46 **L. R. A. (N. S.)** 702. REPORTER.

Railroads—Crossing Accidents—Duty to Look and Listen.

6. Where view of railroad track from road was obstructed by bluff, it was the duty of an automobile driver to look for a train before going on the track.

Railroads—Crossing Accident—Contributory Negligence.

7. Driver of automobile, who approached railroad crossing at about 6 miles per hour without looking or listening, was guilty of contributory negligence when he failed to stop, if necessary in order to see approaching train, before going on track, and was killed by a train.

Negligence—Imputed Negligence—Driver and Occupant of Vehicle.

8. Whether automobile passenger was a guest, or was in partial control of the car, which was negligently driven upon the track and struck by a train, *held* for the jury.

Negligence—Imputed Negligence—Guest in Vehicle.

9. Negligence of the driver of an automobile is not to be imputed to a mere guest.

[As to negligence of driver of automobile as imputable to occupant, see note in Ann. Cas. 1916E, 268.]

Negligence—Imputed Negligence—Joint Adventure.

10. Negligence of the driver of an automobile, who negligently goes upon a railroad track, is to be imputed to one riding with him, who is his master or principal, in control of the machine, or if the passenger and the driver are engaged in a joint adventure, in which the transportation is a factor.

Negligence—Imputed Negligence—Jury Question.

11. Whether deceased automobile driver and injured passenger were engaged in joint adventure *held*, under the evidence, for the jury.

Evidence—Parol Evidence—Varying Writing.

12. It is permissible for a party to a written instrument to explain it and vary its terms, in litigation between himself and strangers to the document.

Negligence—Imputed Negligence—Joint Adventure—Requisites.

13. To establish a joint adventure between automobile driver and passenger, the passenger must have either express or implied right to direct the movement of the car.

Railroads — Crossing Accidents — Automobile Passenger—Rights and Duties.

14. Though passenger in automobile was merely a guest, it was his duty on approaching a railway crossing, to look and listen according to his opportunity, and, if he did not, he assumed the risk.

Negligence—Imputed Negligence—Exercise of Care by Plaintiff.

15. Assuming that an automobile passenger was a mere guest, negligence of the driver could not be imputed to him, if he was in the exercise of reasonable care under all circumstances.

Railroads—Crossing Accidents—Instructions—Generality.

16. In action for injuries and death at railroad crossing, instruction on care required *held* too general.

Railroads—Crossing Accidents—Respective Rights.

17. One in an automobile approaching railroad track cannot assume that the employees of the railroad have performed their duty until after he has effectively looked and listened without seeing or hearing an approaching train.

Trial—Instructions—Assumption of Facts.

18. Where suits of passenger in automobile and of the driver's administrator were tried together, requested instruction that, if either driver or passenger was guilty of negligence contributing to the accident, and without which it would not have occurred, verdict should be for defendant in both cases, was erroneous, as assuming that the relation of the occupants warranted imputing negligence of one of them to the other.

Trial—Instructions—Assumption of Facts.

19. Where suits of passenger in automobile and of the driver's administrator were tried together, requested instruction that, if collision with train happened wholly without the negligence of the passenger, he could recover, though the driver was negligent, was erroneous, as assuming that the driver's negligence could not be imputed to him.

Damages—Instructions.

20. In action for injury at railroad crossing, instruction on damages *held* not erroneous, though subject to criticism.

Railroads—Crossing Accidents—Speed of Train.

21. No rate of speed over a country crossing infrequently traveled is of itself negligence on the part of the railroad.

Evidence—Presumption—Proper Conduct—Speed of Train.

22. The law presumes that the usual rate of speed of trains over a given crossing is reasonable, and not negligent.

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

Frank Weygandt and Alonzo V. Robison were driving together in an automobile, from Meridian, Idaho, to Battle Ground, Washington. They were compelled to travel on the county road in Baker County leading through the Burnt River Canyon. The defendant maintains its railway tracks through the same defile. Owing to the topography, the railway and highway frequently cross each other in that region.

Weygandt was driving the machine and at one of these crossings there was a collision between it and a freight train of the defendant, resulting in the death of Weygandt and the injury of Robison. The administrator of Weygandt brought action for damages accruing to the estate from the death of the decedent and the destruction of the automobile, and Robison brought action on his own account. By consent of the parties the cases were tried simultaneously before the same jury. The charge of negligence was four-fold, in substance: that the defendant failed to maintain a well-equipped warning-bell or other signaling device at or near the crossing; that it failed to warn the plaintiffs of the train's approach, by blowing a whistle or ringing a bell; that it did not keep a lookout on the train for the approach of the plaintiffs from the highway towards the crossing, and, lastly, that it operated the train at a dangerous rate of speed.

The charges of negligence and damages are traversed by the answers. Defending affirmatively, the answer to the complaint of Robison sets forth in substance that he and Weygandt were engaged in a joint enterprise; that the automobile was under their joint control, and, without stopping, looking or listening, without regard for their own safety or the safety of each other, they drove upon the railway track directly in front of the train, and that whatever injury either of them sustained was due to their own recklessness and carelessness.

As an additional defense to Robison's complaint, the answer sets up in substance that he was riding in an automobile driven by Weygandt, sitting by his side; that the plaintiff had assumed the duty of aiding the driver by keeping a lookout and that as the car was approaching the railroad crossing Robison negligently

failed to keep a careful or sufficient lookout and failed negligently to look for the train or to warn the driver of its approach, and permitted him to drive upon the track without stopping, looking or listening, so that whatever injury he sustained therein was due to his own negligence in that respect. The affirmative matter in the answer to the administrator's complaint is that Weygandt was operating the car himself and drove upon the track without stopping, looking or listening, so that his own negligence brought about the accident. The new matter in the answers was traversed. The trial resulted in verdicts and judgments for the plaintiffs, from which the defendant appeals.

REVERSED WITH DIRECTIONS.

For appellant there there was a brief over the names of *Mr. John F. Reilly, Mr. A. C. Spencer* and *Mr. James H. Nichols,* with an oral argument by *Mr. Reilly.*

For respondents there was a brief over the names of *Mr. Claud C. McCulloch, Mr. Oswald West* and *Mr. D. A. Norton,* with an oral argument by *Mr. McCulloch.*

BURNETT, J.—In the vicinity of the crossing the railroad track runs practically north and south. South of the crossing in question the county road runs toward the north, substantially parallel with the track on the west side thereof to a point near the crossing, when it passes eastward over the rails diagonally and continues on its northerly course again about parallel with the rails. The automobile was being driven toward the north and the train was proceeding south. About one thousand feet south of the crossing the wagon road passes over a hill from the summit of

which the plaintiff Robison says they could see the crossing and the track beyond that to the station at the village of Weatherby, except about one hundred and fifty to two hundred yards thereof next north of the crossing. He says that as they proceeded down the hill the view beyond the crossing was entirely obscured by an intervening point of a hill; that although they both looked and listened, and within sixty feet of the crossing slowed down the speed of the car to a rate not exceeding six miles an hour, they could not hear the train approaching or see it until the front of the machine was within three or four feet of the rails; and that the train was then coming at a good rate of speed, said by others to be twenty-five or thirty miles an hour, and struck the automobile about the front door on the left-hand side. Robison testified in substance that just as he saw the train he attempted to jump out of the car. The impact of the locomotive threw him upon the other side of the track and carried Weygandt and the machine about one thousand feet, killing him and wrecking the automobile. At the crossing was the usual cross-arm crossing signal inscribed, "Railroad crossing. Look out for the cars."

After leaving the crest of the hill, the wagon road descends until about three hundred feet from the crossing, it is lower than the railroad tracks and from there approaches the rails on a very slight ascending grade, but almost level. Other parties who were following in another car testified that they did not hear any noise of an approaching train or any whistle or bell. The trainmen and other witnesses attending a ball game near the station all testified that the engine bell was rung continuously from there to the crossing, and that the whistle was sounded not only for the approach to the station but also for the crossing. The train was

composed of fifty-two freight cars and was approximately half a mile long.

At the close of all the evidence the defendant moved the court to direct a verdict for the defendant in both cases, on the ground that the plaintiff had not offered sufficient evidence to entitle the cause to be submitted to the jury; that there had been no evidence of any negligence on the part of the defendant; that the plaintiff's decedent in the one case and the plaintiff himself in the Robison case, each was guilty of negligence contributing to his injury, and, finally, that the evidence considered in the light of physical conditions shows that if the precautions required by law had been observed, the travelers would have seen the approach of the train in time to avoid the accident, and that if they had listened they would have heard it in time to escape injury. The motions were denied and this is the principal error relied upon by the defendant. Some other questions are raised about the instructions to the jury, but we shall first consider the matter of directing a verdict.

1, 2. It is elementary that a verdict cannot be directed if there is any evidence sufficient to be submitted to the jury on the issue involved. The principal contention of the defendant under the motion is, as to Weygandt, that he was directly guilty of contributory negligence resulting in his death, and, as to Robison, that the negligence of Weygandt was imputable to him because they were engaged in a joint affair and likewise that he himself was negligent in failing to warn Weygandt of the train and the proximity of the crossing or to protest against his driving upon the track under the circumstances disclosed by the evidence. The duty of the traveler to use reasonable diligence to avoid a collision at a crossing is equally imperative

with that same duty incumbent upon those who operate the train, with the qualification that the train has the right of way and the preference in passing the point where the track intersects the highway. Each party owes this duty to the other as well as to the traveling public that might be affected disastrously by such a mishap. To excuse a traveler from the harmful consequences to which his own breach of this duty contributes, would be to make of the company an insurer against all and all manner of casualties, whether caused in whole or in part by the fault of the injured party, or not. All the risk would be imposed on one of the parties, whereas the law and reason say that the reciprocal duty of reasonable care to avoid a collision rests alike on both. In most cases the question of negligence is one of fact to be decided by a jury. This is taught by such cases as *Palmer* v. *Portland Ry., L. & P. Co.*, 56 Or. 262 (108 Pac. 211).

Describing the collision, Robison testified as follows:

"Well, the best I can recollect, the way I know it, the train was right there not more than, I guess, one hundred feet, and we were so close to the track there was not time to stop the car and not time to get across, and the engine struck right on the front door on the driver's side. * * I immediately dived for the door on my side and just got my head under the top when it hit."

"Q. Could you tell at what speed the train was traveling?

"A. It was going at a good rate of speed."

Asked:

"Mr. Robison, will you tell the jury about how far in feet it was from the crossing before you got beyond the bluff so you could see the approaching train?"

He answered:

"It seems the front wheels of the car were within three or four feet from the rail, but we were sitting back further in the front seat."

The witness afterward said that the train was from eighty to one hundred feet distant when he had his first view of it. We quote also the following from his testimony:

"Q. This was a calm, still day?
"A. Rather a calm day.
"Q. No wind was blowing at all?
"A. Not noticeably.
"Q. Your automobile was making no noise whatever?
"A. A very still machine.
"Q. You were running in low gear?
"A. We were running in high gear.
"Q. You were running and approaching that crossing four miles an hour on high gear?
"A. Yes, sir.
"Q. You are positive of that?
"A. Just as positive as I can be.
"Q. So there was nothing to attract your attention from your ability to hear sounds?
"A. Nothing.
"Q. And yet you heard no sound which indicated to you there was any person within a mile of you?
"A. No, sir.
"Q. You didn't hear any sound that indicated there was a ball game in progress at the depot?
"A. No, sir.
"Q. You didn't hear any sound there that would indicate there was any train in that neighborhood?
"A. No, sir.
"Q. From the time you came down the top of the hill until you came to this road crossing, you were running about fifteen or sixteen miles per hour, except the last hundred feet; is that right?
"A. Well, it might have been more than sixty feet. You always begin to slow down gradually.

"Q. I didn't intend to say one hundred feet. I understand you now that you testified you were running at the rate of four miles an hour, and not to exceed six, a distance of forty feet of the track?

"A. That is the statement I made.

"Q. Do you still subscribe to that statement?

"A. That statement is correct.

"Q. To return to the other matter; during the time that you were coming down the hill until you got within one hundred feet of the crossing, where you testified you started to slow down, you were running at the rate of fifteen or sixteen miles per hour; is that right?

"A. Practically at that speed. I cannot say, but the slowing down was done on a space of sixty feet.

"Q. Do you mean you could not slow down from fifteen miles an hour to four miles an hour in sixty feet?

"A. Why, a good driver doesn't do that.

"Q. Why can't any driver do it?

"A. A man can do it.

"Q. Ordinarily it is a fact drivers do it—slow down on a level road from fifteen or sixteen miles an hour to four miles, in sixty feet?

"A. I never thought I slowed down that quick.

"Q. Anyhow you were down to four miles an hour at forty feet?

"A. Yes, sir.

"Q. You were running fifteen or sixteen miles an hour most of the distance from the top of the hill until you got within one hundred feet of the crossing. All right. And you knew when you started down the hill there was some sort of a bluff there which made it impossible for you to see the first one hundred and fifty or two hundred yards of the track above the crossing at any time?

"A. Yes, sir.

"Q. Assuming now that this bluff of which you were talking about shut off the view so at any time on your journey from the top of the hill to the track you could not see any part of the track above the crossing, for a distance of one hundred and fifty to two hundred yards. That is your testimony, is it?

"A. Yes, sir.

"Q. All right, we will assume that it is the fact. Now you knew, then, at the time you approached this track, if there was a train anywhere in that one hundred and fifty or two hundred yards, or four hundred and fifty to six hundred feet, you would not be able to see it?

"A. I don't see how I could know it.

"Q. You knew, didn't you, there wasn't any place along in there that you could see that one hundred and fifty or two hundred yards of track?

"A. Yes, sir.

"Q. Therefore you knew at any time you were going along there a train might come on that track?

"A. Yes, sir.

"Q. You were not able to see it?

"A. Where we were then we knew we wasn't able to see it.

"Q. And there was no place anywhere until you got to the track?

"A. There was no way for us to know how close we would be to this track before the view opened in more and we could see.

"Q. You knew before you came on to the track that you were absolutely obstructed?

"A. Yes, sir.

"Q. Why didn't you stop?

"A. We listened and paid every attention, as well as we could, without stopping, and there was no whistle and no bell or anything.

"Q. Why was it when your view was shut off you didn't stop, so you could look? Do you mean you went on without trying and without looking—that you just depended upon your sense of hearing and didn't try to exercise your sense of sight, by stopping?

"A. We looked, but there was no place we could see anything.

"Q. You didn't have an engagement at Baker City within fifteen or twenty minutes after this time, and you were not in a hurry to get across the crossing?

"A. No; no hurry whatever.

"Q. You could have spent half a minute of time at that crossing, so you could have got out and looked?

"A. We could have.

"Q. So you could have stopped there and ascertained if the train was approaching, couldn't you?

"A. Yes, sir.

"Q. But you didn't do it?

"A. No, sir."

3. With respect to accidents at railway crossings, and as a sort of exception to the general precept that negligence is a question for the jury, the rule has been made more specific in detail on account of so many circumstances that are common to all such cases, so that what is required of the traveler has been concentrated into more exact statements than the mere generality that he must use reasonable diligence to avoid an accident. As the means of highway travel have been developed from conveyances drawn by cattle or horses into self-propelled vehicles, including the highly developed automobile, the rules are made still more precise, so as to correspond with the changed conditions. The modern automobile is a machine which may be controlled within very narrow limits. It may be run with safety very much closer to a moving train than would be prudent with a team of spirited horses. At the same time, when carelessly managed it may become an engine of great destruction, even to the possible derailment of a railway train. The situation when an automobile approaches a railroad crossing is only in degree different from that where the train of one railway is about to cross the track of another. The universal practice among railroad men is for the train to come to a full stop before crossing the other track. Of course, in the absence of legislation, we cannot impose so strict a rule upon the motorist, but the fact remains that the automobile and the locomotive are both self-propelled vehicles and it is but pressing the analogy a little to say they are both in a sense

railway trains. Considering their great flexibility of motion, and their great possibility of doing damage, it is but simple justice to demand of automobiles a more particular observance of the rule to look and listen than is required of the driver of a team of horses. On the one hand it is easier for the former to effectuate safety to all concerned, and on the other, neglect of duty is generally fraught with more serious consequences. It has always been the rule, crystallized into one of law, as stated by Mr. Justice BEAN in *Blackburn* v. *Southern Pacific Co.*, 34 Or. 215 (55 Pac. 225, 12 Am. & Eng. Neg. Cas. 515, 12 Am. & Eng. R. Cas. (N. S.) 461), thus:

"It is a principle of law, firmly established in this state as elsewhere, that the failure of a person about to cross a railway track on a highway at grade, to look and listen for an approaching train is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing."

4. If from a place of safety on his way, the traveler in control of the vehicle in which he is riding can obtain a view of the coming train, he must look upon the course of the train from that point, and this responsibility is constant until the danger is past; that is, until he is safely across the railway track. The duty is constant because the danger is incessant. Instead of being intermittent it grows as the traveler gets near the crossing and reaches its climax only as he actually crosses the track in his passage. This obligation he owes not only to himself, but also to those on the train, whether passengers or the laborers employed in its operation. He must not allow his selfish little convenience to override this duty so well grounded in common sense.

5. All the precedents make it incumbent upon the traveler both to look and listen. Neither of them can

be eliminated without its use is practically impossible. The law does not excuse him from exercising both of them, unless there is no reasonable opportunity for that purpose. There is quite as much reason for his stopping so he can see as for stopping so he can hear, if there be any zone of safety from which he can see, and there are obstructions which prevent him from seeing a moving train without halting in that zone. As applied to Weygandt, the testimony on his behalf, in the light most favorable for his administrator, shows that while yet his car was three or four feet from the track the locomotive could be seen at a distance of from eighty to one hundred feet. Even that space would have been clearance sufficient to prevent collision. The locomotive, passing so near, would not have frightened or disturbed his machine as if it had been a spirited team he was driving. We are not deciding within how short a distance an automobile can be brought to a standstill from any given speed. We are only saying that with his car halted three or four feet out of the way of the locomotive a chauffeur safely may look at a train moving on the track before him. There was the railroad track almost in his face in open view. The crossing sign told him in plain language, "Look out for the cars." His own sight advised him from one thousand feet back that the crossing was there and that he would have to pass over it.

6, 7. The administrator claims his decedent could not see the train because of the intervening bluff. If this be true, how could he expect the trainmen to see him? If it was negligence for them not to see him under such conditions, it was equally negligent for him not to see the train they were operating. Looking at the impenetrable hill was futile. It was Weygandt's duty to look upon the only place whence the danger would

come, viz., upon the track, for which view he had safe and ample opportunity before going in front of the train: *Cathcart* v. *Oregon-Wash. R. & N. Co.*, 86 Or. 250 (166 Pac. 308). He was guilty of contributory negligence in not looking from that place of safety, stopping if necessary for that purpose, before advancing to the point of collision. His neglect of that duty cost him his life and his estate must bear the loss.

8. Robison's case differs somewhat from that of his father-in-law. There is evidence from which, if believed, the jury might find that he was a mere invited guest. On the other hand, the circumstances of their kinship by marriage and the fact that they were traveling together to visit their respective wives, mother and daughter, permissibly might lead the jury to conclude that the accomplishment of the journey was a joint venture in which both were equally interested. The court cannot say in this instance as a matter of law which was the true relationship between the two. That is a question for the jury.

9. Substantially the universal rule is that the negligence of the one operating a vehicle is not to be imputed to his companion who is only his guest. The law is thus epitomized in 22 R. C. L., 1049:

"If the occupant of a vehicle would avoid the imputation of the driver's negligence he must himself be free from negligence. Even a wife riding with her husband, or a daughter with her father, may have his negligence as driver imputed to her, if she is indifferent to her own safety. But what amounts to negligence the courts are not agreed upon. Some courts hold that it is the duty of the passenger to use reasonable care and judgment to learn of and avoid danger, so far as he has opportunity to do so. For example, when the conveyance is approaching a railroad crossing, he should look and listen for approaching trains, and, more than this, if he ascertains the presence of

danger he should inform the driver, and remonstrate with and check him in case he attempts to cross in the face of danger. A passenger who acquiesces in the reckless or negligent conduct of the driver on such occasions cannot recover from the railway company in the event of a collision with the cars. He should do all that a prudent and careful man would do under the circumstances, notwithstanding he has no authority or control over the driver. Some authorities have gone so far as to declare that it is no less the duty of the passenger than it is the duty of the driver to be on the lookout for danger and avoid it, but the better rule seems to be that, save in exceptionable cases, a passenger, whether for hire or not, and whether in a public or a private conveyance, should not be held to the same degree of watchfulness as the driver. The primary duty of caring for the safety of the vehicle and passengers rests upon the driver, and unless the danger is obvious or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger. Of course, if the passenger knows that the driver is incompetent or careless, or sees that he is not aware of the danger and is not taking proper precautions, it is his duty to notify him of the danger; and a failure to do so is negligence. But ordinarily it is a question of fact for the jury, under all the circumstances, to determine whether or not the passenger was in the exercise of ordinary care."

In *Schultz* v. *Old Colony Street Ry. Co.*, 193 Mass. 309 (79 N. E. 873, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, 8 L. R. A. (N. S.) 597), the syllabus reads thus:

"The negligence of the driver of a vehicle is not to be imputed to a guest riding with him gratuitously, and personally in the exercise of all the care which ordinary caution requires, so as to preclude the guest from recovering from a third person for personal injuries proximately resulting from his negligence."

In the note to *Rebillard* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 Fed. 503 (L. R. A. 1915B, 953, 133 C. C. A. 9), it is said:

"By the great weight of authority the negligence of the driver of an automobile is not imputable to a guest or passenger riding in the machine, who has no authority or control over the machine or the driver, and this rule is applied in the following cases: (Citing a long list of precedents)."

On a superficial reading, the text in the Rebillard case would seem to be contrary to the doctrine of the note. The circumstances, however, were in substance that the owner of an automobile invited the plaintiff to take a trip with him. Shortly after they started the gas furnishing the lights of the machine gave out. After sundry efforts, the best they could do was to procure an ill-fitting wick for a small kerosene lamp attached to the car, which gave but very feeble light. Without protest on the part of the plaintiff they then proceeded in the dark over an unknown and but little traveled road, from which they finally strayed and ran over the embankment of a railroad cut which was hitherto unknown to any of the party, much less to the plaintiff. The negligence in this case was so flagrant and the acquiescence of the plaintiff in it so plain that in good reason he ought to have been held as a matter of law to have adopted the negligence of the driver. In the instant case there is evidence to the effect that Robison was looking and listening as carefully as if he were operating the car himself.

A case similar in some respects to that of Rebillard was *Winston's Administrator* v. *City of Henderson*, 179 Ky. 220 (200 S. W. 330, L. R. A. 1918C, 646). There two negroes in an evening of carousal got drunk and taking with them two colored women chartered an automobile which one of the men drove

on a joy ride with the other man, plaintiff's decedent, sitting in the front seat with him. Due to the driver's carelessness resulting from his intoxication he ran the car into a ditch in the street which the city had left without adequate guards. The machine was upset and the man seated with the driver was killed. His personal representative was denied recovery because the decedent was negligent in trusting himself voluntarily with a chauffeur known to him to be incompetent by reason of drunkenness.

It is not practical to analyze all the precedents on this point. It is sufficient to say of them that generally it will be found that the negligence of the guest himself was so marked as to amount to an adoption by him of the driver's recklessness.

10, 11. It may be set down, therefore, that a mere guest acting with due care himself is not to suffer by reason of the negligence of the driver. On the other hand, the strong current of authority is to the effect that the negligence of the driver is to be imputed to one riding with him when he is a servant and the latter is his master, or when he is the agent for that purpose, in control of the machine, or, lastly, when they are at the time engaged in a joint venture or common enterprise in which the transportation is a factor. As to the right to control the movement of the automobile, the defendant relies upon the fact appearing in evidence that at the time, and for some months previously, Robison held a bill of sale of the car from Weygandt; that the machine had been registered in his name in Idaho and even that he had presented a claim to the defendant for damages to it before bringing this action. Robison, however, testifies that he himself had not a dollar invested in the car and that his father-in-law had given him a bill of sale of it so that he could

sell it for the account of Weygandt and give good title without having to consult the latter personally. At best, these features about the bill of sale, registration and claim for damages may be set down as contradictions of Robison's testimony to the effect that Weygandt was the owner of the machine, leaving the real truth on that point to be ascertained by the jury.

12. As to the bill of sale, it is permissible for a party to a written instrument to explain it and vary its terms in litigation between himself and strangers to the document: *Pacific Biscuit Co.* v. *Dugger*, 42 Or. 513 (70 Pac. 523); *Smith* v. *Farmers & Merchants' National Bank*, 57 Or. 82 (110 Pac. 410); *Zimmerle* v. *Childers*, 67 Or. 465 (136 Pac. 349).

As before indicated, it is plainly a question of fact whether Robison was purely a guest or whether he was engaged with Weygandt in a joint venture. It is difficult accurately to define the term for the purpose of the instant case and others of a similar nature. As said in *Withey* v. *Fowler Co.*, 164 Iowa, 377 (145 N. W. 923):

"It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for present purposes to say that to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation."

In *Schron* v. *Staten Island Electric Ry. Co.*, 16 App. Div. 111 (45 N. Y. Supp. 124), a father and son were engaged together in the work of moving some goods and employed for that purpose a wagon and team. While one was driving the team with the load and the

other was riding upon it, a collision between the outfit and a street-car occurred, due to the negligence of the driver. In *Donnelly* v. *Brooklyn Ry. Co.,* 109 N. Y. 16 (15 N. E. 733), the plaintiff and another were returning from delivering a load of fish and had on their vehicle a stack of empty boxes. By the driver's negligence the plaintiff was hurt in a collision with the street-car. In the case of *Louisville & N. R. Co.* v. *Armstrong,* 127 Ky. 367 (32 Ky. Law Rep. 252, 105 S. W. 473), two persons were hauling fodder together when the team had a collision with a railway car, due to the negligence of the one driving. It was held in *Alabama G. S. R. Co.* v. *Hanbury,* 161 Ala. 358 (49 South. 467), that a conductor and engineer in charge of a train were engaged in a joint enterprise, with the result that the negligence of one is imputed to the other, who was injured by the collision of that train with that of another road.

13. In all these cases, however, there runs a vein of common financial interest, indicating a *quasi* partnership entailing the usual joint control. This would seem to furnish the ultimate distinguishing characteristic of joint venture in such cases, which is none other than the right, either express or implied, to direct the movement of the vehicle employed in the transportation connected with the venture. This must be so, because fault in the operation of the vehicle is charged as negligence. In order, therefore, for the negligence in that respect which was actually that of Weygandt to be imputed to Robison, it being culpable operation of the automobile, the latter must have had some authority to direct the movement of the machine.

For the sake of brevity in terminology we may call the supposed joint scheme a partnership. If then it shall appear either by direct testimony or by circum-

stantial evidence that the terms of this so-called partnership provide that each party to it may control the vehicle or direct its movements either constantly or alternately, the negligence of the one will be imputable to the other so far as it grows out of faulty management or operation of the machine of transportation. But if such control is outside the scope of the partnership or is vested exclusively in one of the members, imputed negligence in operation will not arise. The dilemma presents a mixed question of law and fact which must be left to the jury under proper directions in all cases where there is a dispute in the testimony or where reasonable men would fairly draw a different conclusion from the same evidence. Imputed negligence must be attributed to some fault in carrying out the provisions of the partnership.

It is only by virtue of some association such as we have pointed out that the negligence of Weygandt can be imputed to Robison to the latter's disadvantage, for, as said in Section 705, L. O. L.:

"The right of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relationship between them."

We may draw an analogy from the situation of the defendant in this case. Strictly speaking, there is no negligence of the company itself. It is penalized, if at all, only by the actual negligence of its employees in charge of the train. By virtue of their connection with the defendant their negligence is imputed to it. So here, Weygandt's imprudent handling of the automobile can be set down to the detriment of Robison only by virtue of one or more of the particular relations already mentioned. Whether they or any of them existed is a question of fact.

14. All this, however, does not excuse Robison from acting as a reasonably prudent man under the circumstances in looking out for his own safety. Although even a guest, as he neared the railway crossing it was his duty to look and listen according to his opportunity. If, with knowledge of the situation but without protest or warning he acquiesces in the negligence of the driver going into the danger by which he is injured, he adopts that negligence as his own. It is not imputed to him *nolens volens*, but on the other hand, he assumes it. The duty to look from where he can see and to listen from where he can hear is incumbent upon him as well as upon the driver where they have equal chance and if he does nothing to carry out this direction of the law he is negligent on his own account: *White* v. *Portland Gas & Coke Co.*, 84 Or. 643 (165 Pac. 1005). The question is a narrow one, whether Robison made proper and diligent use of the information he had about the conditions present. Weygandt was in the actual control of the machine. It is in evidence that he was an experienced driver; that he slowed down the speed to between four and six miles an hour as he approached the crossing. The jury had before it the question of whether Robison acted as a reasonably prudent man under those circumstances. It might consider he had a right to believe from Weygandt's retarding the motion of the automobile to the rate mentioned that he was going to stop before reaching the track. Some might say that Robison acted negligently in not demanding that the car be stopped further back; others might hold that as it was subject to such exact control it would be safe enough to go forward until the train would clear it only by a distance of three or four feet. The jury might have determined properly that considering his confidence in the skill of

the driver and influenced by his slackening the speed of the car, Robison had reason to believe that his companion would halt in a place of safety, so that without his fault the situation developed into one of sudden and imminent danger, somewhat clouding his judgment, and that his effort to escape by jumping out of the automobile was on his part the exercise of reasonable diligence to escape injury. All this is a question of fact for the jury in the Robison case, and as to him the rule denying the motion for a directed verdict was correct.

15. In brief, as to Robison, it was a jury question whether he was a guest or engaged in a joint enterprise, or had authority to control the movement of the machine. Negligence of Weygandt could not be imputed to Robison as a mere guest if the latter was in the exercise of reasonable care under all the circumstances. As a basis of imputing Weygandt's negligence to Robison it must be established as a matter of fact that the latter was in authority over the machine entirely or in part or was the principal to the former's servantship or agency, or that they were engaged in a joint enterprise. This basis should be left as a question of fact to the jury, and as to Robison's negligence, he being not in actual control of the machine, it was a question for the jury whether he knowingly acquiesced in Weygandt's negligence and adopted it, or whether he acted as a reasonably prudent man under all the circumstances.

It remains to consider the assignments relating to the instructions given and refused. In the eighteenth instruction the court charged the jury in part thus:

"The law assumes, and so must the traveler, that there is danger at a railroad crossing; and it is therefore an established rule of law that the traveler must exercise care and caution when approaching a railroad

crossing. If a train is approaching and the traveler has knowledge thereof, or could have such knowledge by the use of his faculties and ordinary care, it is his duty to yield right of way and wait in safety until such train had passed.

"To this end the law requires that at such place as reasonable prudence and care would dictate to an ordinary prudent person so situated, upon seeing the railway crossing he shall look and listen, whether such signals or alarm be given or not, to ascertain whether any moving train is near. He is required in such a situation to look and listen with intent and purpose of ascertaining whether such a train is approaching, and to then use reasonable care to take adequate precaution for his own safety. * * "

The twentieth instruction is here set down:

"Those operating a railway train are charged with and must perform the duty toward the traveler on the highway as I have defined that duty, and have the right in the absence of notice or knowledge to the contrary, to assume that the traveler observes and discharges his own duty such as I have stated; and, on the other hand, the traveler is charged with and must perform the duty of reasonable care for his own safety, and has a right to assume, in the absence of notice or knowledge to the contrary, that those operating the train perform their duty. In other words, each is charged with the respective duties I have defined and in the absence of knowledge to the contrary, neither is bound to assume or anticipate or to act upon the assumption that the other will fail to perform such duty."

16. The eighteenth paragraph of the charge is too general in its terms and leaves it open to be said, for example in the instant case, that the traveler's duty would be performed by looking for a train at the top of the hill mentioned, one thousand feet from the crossing, and then giving no further attention to the matter; whereas the true rule is that the obligation to look and

listen, and that, too, from points on the highway, if such there are, where the same may be effective, continues until the point of danger, namely, the crossing, is passed. Respecting the twentieth instruction, the rule is thus laid down in 22 R. C. L. 1040:

"One approaching a crossing has a right to assume that the railway company will act with proper care, and that all reasonable and necessary signals of the approach of trains will be given; and in some jurisdictions it is provided by statute that a want of ordinary care will not bar a traveler in an action for damages against a railroad company, when the statutory signals are omitted. But the general rule is that a traveler upon the highway approaching a railroad crossing has no right to depend solely upon any signals from a passing train, and must, in the absence of such signals, still exercise reasonable care for his safety, and endeavor to ascertain by looking and listening the actual fact whether or not a train is approaching, especially where his view is obscured; and whenever the due use of either sense would have enabled the injured person to escape danger, his failure to use it is conclusive proof of negligence, without any reference to the company's failure to perform its duty."

17. The precedents cited in support of the text all lay down the rule, in effect, that the traveler must first look and listen effectively without having seen or heard anything indicating the coming of a train, before he is authorized to assume that the company has performed its duty in that respect. Inasmuch as the railway company has the right of way and priority of passage as against other vehicles using the public road at a crossing, the rights of a traveler on the highway and those of the company are not precisely identical. In the absence of anything to the contrary, those in charge of the train have a right to assume that the traveler will yield to it the preference and allow the

locomotive to pass the intersection first. The reason for this is found in the company's precedence in transit, which in turn is grounded on the right of eminent domain by which it acquired the right of way. On the other hand, to say to the traveler that he is not bound to act upon the assumption that the railway company will fail to perform its duty to warn him of the approach of the train, without reference to whether his absence of knowledge to the contrary was founded upon the performance of his own duty or not, is tacitly at least to invite him to act upon the mere supposition that the company is doing its duty. In that respect, the twentieth instruction was not altogether consistent with the clause in the eighteenth paragraph requiring the traveler to look and listen, whether other signals or alarm be given or not. It is only when he has first done what the law requires of him in the way of looking and listening, without seeing or hearing anything indicative of danger, that the traveler is authorized to assume that the passage is safe. The instruction as given practically eliminates the duty enjoined upon the traveler and allows him to act upon mere hypothesis. To permit him to rely upon such an assumption is in effect to introduce the doctrine of comparative negligence, at variance with the elementary rule that a plaintiff's contributory negligence will bar his recovery although the carelessness of the other party was a factor in the injury.

18. The defendant asked the court to say to the jury:

"If you find from the evidence that either of the occupants of said automobile was guilty of negligence which contributed to the accident and without which the accident would not have occurred, then your verdit should be for the defendant in both cases."

This request was properly refused, because it assumes that there was a relation between the two travel-

ers by which the negligence of one would be imputed to the other. But, as we have seen, there was evidence on both sides of that disputed question. Robison's doings about the car, already noted, if unexplained would authorize the jury to find that he was its owner with the right to direct its movements, which, if true, would impute to him the negligence of the man to whom he had entrusted the driving of it: *West* v. *Kern*, 88 Or. 247 (171 Pac. 413, 1050, L. R. A. 1918D, 920). On the other hand, if the jury found that the car was Weygandt's, entailing his right of control, his negligence would not be imputable to Robison on that ground. However, the court, speaking of the allegation that Robison had assumed but had failed properly to perform the duty of looking out, went on to say:

"If you find that such arrangement was made and that Robison failed to exercise such reasonable care and caution in his situation to look and listen, that by so looking and listening he could have learned of the danger and by warning to the driver could have avoided it, then, if such were the facts and that such neglect was a contributing cause of the accident, plaintiff cannot recover, even if he did not himself order the driver to drive on to the tracks of the crossing, but if Robison was not negligent or if no such negligence of his was such a contributing cause of the accident, then if the accident happened wholly without such omission or negligence of Robison, then he would be entitled to recover, even though the driver of the car was negligent. * * "

19. The error of this statement is the counterpart of the one in the defendant's request above quoted, in that it ignored the fact possibly deducible from the testimony, that Robison had the right to control the car, in which case though personally free from negligence, yet he would be charged by imputation with the negligence of the one to whom he had intrusted the driv-

ing of the car. Throughout the charge the court left out of view the theory of the defendant that Robison had a right to control the automobile or that he and his father-in-law were engaged in a joint venture, both of which were allowably inferable from the testimony.

20. The defendant complains of the court's making this statement to the jury:

"If you find for Alonzo V. Robison, then it is for you further to determine from all the facts and circumstances in evidence what amount would be fair and just, and for that purpose you may then consider his age, his previous health and physical condition and impairment thereof, whether permanent or temporary, his earning capacity and impairment thereof, if any, like pain he may have suffered as a direct result of the accident, and in your verdict state the amount you find he would be entitled to as reasonable and just compensation for the injuries or loss he has sustained or in no event exceeding the amount demanded in the complaint."

In support of the exception to this charge we are cited to *Rugenstein* v. *Ottenheimer,* 70 Or. 600 (140 Pac. 747), the vice of the instruction in which was in this language, used by the court in directing the jury:

"Now, gentlemen, take the facts in this case—do what is right between the plaintiff and the defendant here without regard to anything except as your own conscience dictates. Do this under the evidence and the rules of law as I have given them to you."

This was held to invite the jury into the field of conjecture without any restriction except its collective conscience. While the instruction in the instant case is subject to criticism, its departure from the strict rule of the law to the effect that the damages must be limited to compensation for such injuries as were established by the evidence, is not so marked as in the precedent noted, and it is believed that upon a new

trial of the instant case like ground for objection may be avoided. Within the meaning of *Russell* v. *Oregon R. & N. Co.*, 54 Or. 128 (102 Pac. 619, 56 Am. & Eng. R. Cas. (N. S.) 497), neither the pleading nor the evidence makes a case requiring an automatic bell at the crossing in question and that ground of negligence involved in the want of such a signal should have been withdrawn from the jury by appropriate directions.

21, 22. Touching the accusation that the defendant was negligent in running its train at an excessive rate of speed its counsel asked the court to charge the jury thus:

"In respect to the allegation of negligence in the complaint to the effect that defendant operated its train at a negligently high, dangerous and excessive rate of speed, I instruct you that no rate of speed over a country crossing such as the evidence shows the crossing in question to have been is of itself negligence. The requirements of industry and the convenience of the traveling public require that railroad trains shall be operated at high rates of speed and it is for you to say whether under the circumstances of this case the rate of speed at which you find that this train was operated was negligent, and if you find it to have been negligent whether such negligence was the proximate cause of the accident.

"In this same connection I instruct you that the law presumes the usual rate of speed to be a reasonable rate of speed and not to be negligent."

The trial judge not only refused these requests but also failed to give to the jury any directions whatever on that branch of the case. The two requested instructions last quoted are a fair exposition of the law as applied to this case and should have been given: 22 R. C. L. 1011.

The conclusion is that the judgment in each case must be reversed, with directions in the Weygandt case

to enter judgment for the defendant as upon a directed verdict in its favor; and in the Robison case, for a new trial of the issues involved.

Reversed With Directions. Rehearing Denied.

Harris, J., absent.

Johns, J., took no part in the consideration of either of these cases.

Argued November 13, 1918, reversed January 14, 1919.

In Re COUNTY ROAD No. 65.
APPEAL OF WILLAMETTE PAC. R. CO.

(177 Pac. 426.)

Railroads—Public Service Commission—Jurisdiction—Construction of New Highway.

1. Where a railroad company appropriated part of a county road for its right of way, under a contract with the County Court to establish another road, but the company failed to carry out its agreement, *held* that, under Laws of 1913, page 577, Section 1, the Public Service Commission was without jurisdiction to order the railroad company to construct a highway in lieu of the one appropriated.

From Lane: Percy R. Kelly, Judge.

Department 2.

The Willamette Pacific Railroad Company, an Oregon corporation, was engaged in the construction of a railroad from Eugene to Marshfield and in the course thereof it became necessary and requisite for it to appropriate a certain portion of County Road No. 65 in Lane County. On proper application by the company, the County Court of Lane County, on April 25, 1913, duly made and entered the following order:

"Now, Therefore, it is hereby ordered that said Willamette Pacific Railroad Company be, and it is,

hereby granted subject to the conditions hereinafter set forth a franchise, authority and privilege to appropriate for the purpose of constructing the said railroad over and across the said County Road No. 65 from a point on said road where the west line of Section 11, Township 18, South, of Range 10 West intersects said county road to the point on said county road where the west line of Section 20, Township 18 South, of Range 11 West intersects said county road.

"It is hereby further ordered that the Willamette Pacific Railroad Company shall have the right, franchise and privilege subject to the conditions hereinafter set forth to immediately appropriate the portion of said County Road No. 65, as herein provided and designated at once, and to build and construct its said line of railroad over and across said county road between said points.

"It is hereby further ordered that said county road shall be appropriated upon the terms and condition, as follows, to wit:

"First: The Willamette Pacific Railroad Company does hereby agree to build and construct in lieu of the county road so appropriated another county road.

"Second: That the Willamette Pacific Railroad Company and the County Court of Lane County, shall on or before September 2, 1913, from the date of this order attempt to agree upon the specifications, locations and time within which said road shall be built for the county road to be built and constructed by the Willamette Pacific Railroad Company in lieu of the portions of the County Road No. 65 so appropriated by said company.

"Third: That in the event the Willamette Pacific Railroad Company and the County Court for Lane County, Oregon, shall not be able to agree upon the specifications for the said county road to be built in lieu of said road No. 65, so appropriated, within the time above specified, then, in that event the Willamette Pacific Railroad Company shall resort to an action of condemnation under the statute of the State of Oregon in such cases made and provided, and the order herein shall not in any way prejudice the right of the Willa-

mette Pacific Railroad Company in maintaining said action, or the County Court of Lane County, Oregon, in defending the same.

"This order shall not go into effect or be of force, unless the said Railroad Company shall within thirty (30) days from the date of the making of this order, file with the County Clerk of the said county its acceptance of all the terms and conditions therein duly executed by its proper official thereunto duly authorized."

On May 14, 1913, the Railroad Company through its board of directors duly adopted a resolution authorizing its proper officers to execute "acceptances of each of said franchises granted, or which may hereafter be granted, as aforesaid, and to consent to the terms and conditions thereof" and to certify such resolution to the County Court of Lane County. On the same date the Railroad Company by such authorized officers duly executed and filed with the county clerk its written acceptance in which it assented and agreed "to observe, fulfill and perform each and every and all and singular the terms and conditions" of the franchise. On August 30, 1913, by mutual consent, the order of acceptance was amended to extend the time to "on or before September 2, 1914," in which "to agree upon the specifications, locations and time within which said road shall be built, for the county road to be built and constructed by the Willamette Pacific Railroad Company, in lieu of the portions of the County Road No. 65, so appropriated."

By virtue of said order and the acceptance thereof, the company at once entered into and upon the designated portions of said County Road No. 65 and constructed its line of railroad across the same, and at all times since has been and now is operating its line of

railroad over such county road so taken and appropriated.

The County Court and the Railroad Company have never agreed upon the specifications for the county road to be constructed in lieu of the part of the road vacated, which was taken by the Railroad Company, and have never agreed as to the time in which the new road should be constructed. To enforce the agreement between the County Court and the company, the County Court of Lane County on March 16, 1916, filed with the Public Service Commission of Oregon its petition in which it sets forth and alleges:

"That the Willamette Pacific Railroad Company on or about the 25th day of April, A. D. 1913, appropriated a portion of one of the public highways of Lane County, Oregon, said public highway being known as County Road No. 65, and the portion of said road appropriated by said Railroad Company being more particularly described as follows:

"That portion of County Road No. 65 in Lane County, Oregon, from a point on said County Road No. 65, where the west line of Section 11, Township 18 south of Range 10 west intersects said County Road, to the point on said County Road where the west line of Section 20, Township 18 south of Range 11 west intersects said County Road.

"That prior to the appropriation of the said County Road by the said Railroad Company, said County Road had been duly and regularly established as a County Road, the establishment of which said road is filed in the records of the County Court of and for said County and State, and that said road for a long time prior to the appropriation heretofore mentioned had been in use by the people living in the vicinity of said road and was so used at the time of the said appropriation by said Railroad Company.

"That at or about the time the said Railroad Company appropriated said County Road for the use of constructing thereon a railroad, the said Railroad

Company through its agents agreed to and with the County Court of Lane County, Oregon, to construct a county road or highway on other property contiguous or adjacent to the portion of said County Road appropriated by the Railroad Company, which said County Road so constructed was to conform in a material character, as to grade and construction, as might be agreed upon by the Railroad Company and the County Court of and for Lane County, Oregon.

"That the said Railroad Company has already appropriated the portion of the county highway heretofore described and has constructed thereon its roadbed and railroad and is operating trains thereon, but has wholly and completely failed to construct or furnish Lane County any other road in lieu of the portion of the public highway appropriated by said Railroad Company.

"That the County Court has diligently and earnestly endeavored to effect a settlement with the Railroad Company, by which settlement the County would acquire a public highway in lieu of the public highway appropriated by the Railroad Company, but so far has failed to accomplish said purpose or end, and the said Railroad Company and the County Court are wholly and completely unable to agree upon the matters of difference between said Railroad Company and Lane County."

It recites that the controversy has existed for "the past three years"; that the inhabitants of Lane County living in the vicinity of said county road so appropriated have been deprived of and denied the use of any highway; that their children have been obliged to travel over the Railroad Company's right of way in going to and from school; that because of dangerous trestles this right of way is unsafe for their use, and that they have no other means of travel except by boat. An answer to this petition was filed by the Railroad Company, in which it denied "each and every allega-

tion and the whole thereof in plaintiffs' complaint contained."

After the issues were joined and testimony was taken, the Public Service Commission made certain findings of fact, and based thereon made an order that within four months the Railroad Company, in lieu of the highway appropriated by it, should "construct a highway along the north bank of the Siuslaw River in accord with certain plans and specifications therefor." The Railroad Company then appealed to the Circuit Court of Lane County, which on March 20, 1918, made its findings of fact and conclusions of law and in legal effect affirmed the order of the Public Service Commission, except as to the time for construction, which was extended four months. From the decree made and entered on these findings of fact and conclusions of law, the Railroad Company prosecutes this appeal.

There is no claim or pretense that the Railroad Company has kept or performed any of the terms or conditions of its contract with the County Court of Lane County by it to be kept and performed, that it has constructed another and different county road, or that there was ever any agreement as to the specifications or as to when such new county road should be constructed. The original county road vacated and appropriated by the Railroad Company was more or less crude and unfinished, yet it was an outlet for about fifteen families residing in its vicinity. It was constructed in the bed of a narrow canyon, over numerous ravines and gulches, and there was sufficient space for only one roadbed. It is apparent that the agreement was made in good faith by the County Court to avoid delay and to facilitate the construction of the railroad.

REVERSED.

For appellant there was a brief over the names of *Mr. Ben C. Dey,* and *Mr. Alfred A. Hampson,* with an oral argument by *Mr. Dey.*

For respondent there was a brief and an oral argument by *Mr. J. M. Devers,* for Lane County.

JOHNS, J.—1. The contract of April 25, 1913, was executed by both parties with all of the required legal formalities.

Counsel have presented numerous points, but under our view of this case the only material one is the question of jurisdiction of the Public Service Commission to make the order mentioned. We do not think that Sections 6 and 8 of Chapter 279, page 483, Laws of 1911, are broad enough or were ever intended to apply to a proceeding of this kind. Any authority of the Public Service Commission to make its order must be found in the provisions of Section 1, Chapter 302, page 577, Laws of 1913, in which it is said that:

"Whenever it shall be necessary for any corporation mentioned in Section 6838 of Lord's Oregon Laws to appropriate any county road or highway, * * said corporation shall be and it is hereby authorized and empowered to appropriate the same, or so much thereof as may be necessary, and in lieu thereof to condemn or otherwise acquire property contiguous to or as near adjacent thereto as possible, an equal amount of property to be appropriated. * * "

Upon the construction by such corporation of a new road upon any grade which

"may be agreed upon by said corporation and the County Court of the county in which said road is located, and upon the acceptance by such County Court of such newly constructed road, and on the conveyance of same to such county, said corporation shall then become the owner and entitled to the possession

of so much of said county road or highway so appropriated."

It is further provided therein that

"in the event the County Court and corporation cannot agree upon the matters herein provided to be agreed upon between said corporation and the County Court, the same shall then be referred to the Railroad (now Public Service) Commission of Oregon, who shall, after notice and hearing, determine the terms and conditions upon which said corporation may appropriate said county road or highway."

Either party is given the right of appeal to the Circuit Court and thence to this court.

The agreement between the County Court and the Railroad Company recites:

"That said Willamette Pacific Railroad Company be and it is hereby granted subject to the conditions hereinafter set forth a franchise, authority and privilege to appropriate for the purpose of constructing the said railroad over and across said County Road No. 65"; that the company "shall have the right, franchise and privilege, subject to the conditions hereinafter set forth, immediately to appropriate the portion of said County Road No. 65 herein provided and designated, at once, and to build and construct its said line of railroad over and across said county road between said points"; that "it is hereby further ordered that said county road shall be appropriated upon the terms and conditions as follows."

Then follow the agreement of the Railroad Company to build another county road in lieu of the road appropriated, and the time limitation of September 2, 1913, "when the parties shall attempt to agree upon the specifications, locations and time" within which the new county road should be constructed. It is further provided that if the parties shall not be able to agree within the time stated, the Railroad Company "shall

resort to an action of condemnation under the statute of the State of Oregon in such cases made and provided" and that such action shall be without prejudice to either party.

On August 30, 1913, the time within which the parties should attempt to agree "upon the specifications, locations and time within which said road" should be built, was extended from September 2, 1913, to September 2, 1914. The petition of the County Court to the Public Service Commission specifically states:

That "the Willamette Pacific Railroad Company on or about the 25th day of April, 1913, appropriated a portion of one of the public highways of Lane County, Oregon, said public highway being known as County Road No. 65"; that "prior to the appropriation" the road had been duly established as a county road; that "said road for a long time prior to the appropriation" had been in use by the people living in the vicinity thereof and was so used "at the time of said appropriation by said Railroad Company"; that "at or about the time the Railroad Company appropriated said county road for the use of constructing thereon a railroad," it agreed to construct a new public highway on property adjacent or contiguous to the original road; that "the said Railroad Company" had "already appropriated the portion of the county highway heretofore described" and had "constructed thereon its roadbed and railroad and is operating trains thereon"; that "it is necessary and urgent that the Railroad Company be required to furnish a public highway in lieu of the portion of the county road or highway appropriated by the said company."

Such are the terms and conditions of the contract between the County Court and the Railroad Company, and the material allegations set forth in the petition to the Public Service Commission, upon which its order was based.

While the County Court and the Railroad Company did not agree upon the specifications provided for by the contract, the fact remains that they did execute the agreement in question and that under the provisions thereof the county road was vacated and appropriated by the Railroad Company, which entered and took possession of the highway and constructed its railroad thereon, and now fails and neglects to carry out its part of the contract.

Section 1, Chapter 302, Laws of 1913, provides:

That "in the event the County Court and the corporation cannot agree," the subject matter shall then be referred to the Public Service Commission, "who shall, after notice and hearing, determine the terms and conditions upon which said corporation may appropriate said county road or highway."

But we have here a case in which the parties did agree, and executed the contract, from which as well as from the petition to the Public Service Commission it appears that the company had appropriated the county road and was in possession under its apropriation. The authority so to appropriate was expressly granted by the terms of the contract, and the subject matter of the present litigation is that identical contract, the terms and provisions of which have been kept by the County Court and violated by the Railroad Company. Under such a state of facts we are clearly of the opinion that the Public Service Commission did not have any authority to determine the terms and conditions upon which an appropriation should be made, or to make the order in question.

The writer of this opinion has no sympathy for, and but little patience with, the conduct of the Railroad Company shown by the record. The company has apparently violated a contract which was made to assist it in the construction of its line of road. Without de-

lay or further litigation, and as a matter of justice, it should either vacate the county road which it took and appropriated under its contract, construct a new county road as it agreed to do, or make a fair and reasonable settlement with the County Court.

The decree of the Circuit Court is reversed, the petition is dismissed and neither party shall recover costs in this court, the Circuit Court or before the Public Service Commission. REVERSED.

BEAN, BENSON and BURNETT, JJ., concur.

Argued October 15, 1918, reversed and remanded January 14, 1919.

RIDLEY v. PORTLAND TAXICAB CO.

(177 Pac. 429.)

Trial—Motion for Nonsuit—Effect.

1. A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for plaintiff, and the court must decide whether there would be a want of evidence to support a verdict for plaintiff, though all his evidence be assumed true.

Trial—Motion for Directed Verdict—Effect.

2. A motion for a directed verdict presents the same question for decision as does a motion for judgment of nonsuit, but the plaintiff is entitled to the benefit, not only of his own evidence, but to the benefit of any evidence favorable to him, though introduced by defendant.

[As to when compulsory nonsuit should be granted, see note in 24 Am. Dec. 620.]

Judgment—Finality—Motion for Dismissal—Directed Verdict.

3. While a judgment of nonsuit under Section 184, L. O. L., operates merely as a dismissal, a judgment on a directed verdict concludes the controversy.

Trial—Motions—Demurrer to Pleading.

4. A motion for a directed verdict, as well as a motion for an involuntary judgment of nonsuit, challenges the legal sufficiency of the evidence, and in that way performs the same function in connection with the evidence as does a demurrer to a pleading, but neither of the motions is designed to perform the function of a demurrer to a pleading.

Trial—Directed Verdict—Defects in Complaint.

5. Though a complaint omits some material allegation, a motion for a directed verdict, based upon the fact of such omission, should be denied, where the objection can be cured by amendment, and plaintiff's evidence, if true, makes a case against the defendant.

Master and Servant—Injuries to Servant—Evidence—Jury Question.

6. In an action by a taxicab driver, who claimed to have suffered injuries as a result of defective wrench furnished by the employer to enable drivers to replace punctured tires, evidence *held* sufficient to carry the case to the jury.

Master and Servant—Injuries to Servant—Workmen's Compensation.

7. Cause of action by a taxicab driver for injuries received as a result of a defective wrench furnished by the employer to remove punctured tires, etc., does not fall within the Employers' Liability Act.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1.

The Portland Taxicab Company, the defendant, is a corporation engaged in the taxicab business in Portland, P. L. Ridley, the plaintiff, was an experienced chauffeur and had been employed by the defendant for about three months as an extra driver. At some time in the evening of October 23, 1916, probably about 8:30 o'clock, the plaintiff was ordered by his employer to answer a call from the Barker Apartments located at the corner of 21st and Irving Streets. Ridley immediately drove to the Barker Apartments; but he "had a blow-out" at about the time of his arrival at his destination. The wheels of the taxicabs operated by the defendant are equipped with demountable rims so that tires can be changed quickly whenever it becomes necessary to change them. The rim and the tire are held in place on the wheel by three "lugs," as one witness called them, or "worms" as another witness designated them. The taxicab driven by Ridley, like all the others operated by the defendant, was equipped with a jack, a jack-handle and a tire wrench. The tire-wrench is like the ordinary brace which is used with

a bit, except that the socket, instead of being adjustable, is sized and shaped so as to fit one end or the head of the "lugs" or "worms" which lock the tire and demountable rim to the wheel. The tire wrench is operated on the same principle as an ordinary brace and bit; and to remove a tire from one of defendant's taxicabs the operator uses the tire wrench to loosen the three "lugs" or "worms" and then takes the tire off the wheel. The jack, jack-handle and tire wrench are kept under the front seat. The available space under the front seat is not the same in all the cabs. There was a gas-tank under the front seat of the car used by Ridley, leaving for the tools "about seven inches clearance on the end and about three to three and a quarter clearance to the front." The plaintiff stopped his car after the "blow-out." It was dark. The plaintiff says that "this is the first time I had this cab." Ridley testified that he did not know how many tools were "in that tool-box"; but, to use his language, "all I know, I put my hand in there to find the tools I wanted, the jack, the jack-handle and the wrench." Ridley jacked up the wheel and then "put the wrench on the first nut, and it slipped off and flew up," when he "put the strain on it," striking him in the eye, breaking his eye-glasses, and injuring him. The socket in the wrench, according to the contention of plaintiff, had become worn so that when placed on the end of the "lug" the wrench "would just catch enough so that when you pulled up on it it would slip off." A few minutes after the accident Ridley again went to the "tool-box" and got another tire wrench with which he made the tire change without any further difficulty. The plaintiff stated that he did not know that there were two wrenches in the "tool-box" when he got the first wrench and the jack.

The complaint avers that the work of changing tires was done "by a wrench furnished by defendant" and then alleges:

"That the wrench furnished by defendant was old, worn and defective; that the portion of said wrench which fit over the nut was old, worn and defective and had been used to such an extent that the same was rounded to such an extent that it would not firmly hold the nuts in.

"That when plaintiff attempted to remove said nut, on account of said wrench being old, worn and defective, that portion thereof which was used to secure and hold said nut permanently, slipped, and the wrench struck plaintiff in the eye; that plaintiff was wearing glasses and the force of said blow broke both glasses and drove portions of said glass into his right eye."

Plaintiff alleges that defendant was careless and negligent in the following particulars, to wit:

"1. That said defendant carelessly and negligently furnished plaintiff with an old, worn and defective wrench unsuitable for the purpose of being used as a wrench."

The trial resulted in a directed verdict for the defendant and the plaintiff appealed.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs, Davis & Farrell* and *Mr. E. K. Oppenheimer,* with an oral argument by *Mr. Wilfred E. Farrell.*

For respondent there was a brief over the name of *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Harrison Allen.*

HARRIS, J.—Among the reasons urged, in the Circuit Court, by the defendant in support of its motion for a directed verdict, was the claim that the complaint

did not state a cause of action since the pleading did not contain an allegation that the defendant knew or ought to have known that the tire wrench was defective. The defendant took the position that the words "carelessly and negligently furnished plaintiff with an old, worn and defective wrench" did not amount to an averment that the employer had knowledge of the alleged defective condition of the wrench. Although the plaintiff insisted that the quoted allegation was equivalent to an averment that the employer had knowledge of the defective condition of the wrench, still in order to remove any doubt about the sufficiency of the pleading, he requested permission to amend the complaint by inserting the words "of which the defendant had knowledge or should have known under the circumstances." The defendant objected to the proposed amendment. The court expressed a willingness to allow the motion to amend "if it is possible for an amendment to be made at this time"; but without finally ruling on the motion for permission to amend, the court stated that "nothing could be gained by an amendment as there is no evidence on that point"; and for that reason granted the motion for a directed verdict.

Assuming for the purposes of the discussion that the complaint does not allege that the defendant knew or ought to have known that the wrench was defective and that, on account of omitting this material allegation, the complaint is vulnerable to a demurrer, nevertheless, on the record presented here, it was error to direct a verdict for the defendant.

1–4. A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for the plaintiff: *Brown* v. *Oregon Lumber Co.*, 24 Or. 315, 317 (33 Pac. 557). The judge is called upon to decide

whether there would be a "want of evidence to support" a verdict for the plaintiff even though all the evidence for the plaintiff is assumed to be true: Section 183, L. O. L. A motion for a directed verdict presents the same question for decision as does a motion for a judgment of nonsuit; but the plaintiff is of course entitled to the benefit not only of his own evidence but also to the benefit of any evidence favorable to him though introduced by the defendant: *Huber* v. *Miller*, 41 Or. 103, 110 (68 Pac. 400); *Merrill* v. *Missouri Bridge Co.*, 69 Or. 585, 593 (140 Pac. 439). While a motion for a nonsuit and a motion for a directed verdict give rise to the same inquiry the result of an approving decision is not the same. A judgment of nonsuit operates merely as a dismissal of the action: 184, L. O. L.; *Malloy* v. *Marshall-Wells Hdw. Co.*, *ante*, p. 303 (175 Pac. 661); but a judgment on a directed verdict concludes the controversy: *Huber* v. *Miller*, 41 Or. 103, 110 (68 Pac. 400). A motion for a directed verdict as well as a motion for an involuntary judgment of nonsuit challenges the legal sufficiency of the evidence. Each of these motions performs the same function in connection with the evidence as does a demurrer in connection with a pleading; but neither of these motions is designed to perform the function of a demurrer to a pleading.

5. Even though a complaint omits some material allegation a motion for a directed verdict, based upon the fact of such omission, should be denied, especially where the objection can be cured by an amendment and the plaintiff's evidence, if true, makes a case against the defendant: *Meyers* v. *Syndicate Heat & Power Co.*, 47 Wash. 48 (91 Pac. 549); *Gerke* v. *Fancher*, 158 Ill. 375 (41 N. E. 982); *Cahill* v. *Illinois Cent. R. Co.*, 137 Iowa, 577 (115 N. W. 216); *Wrought Iron Bridge Co.*

v. *Greene,* 53 Iowa, 562 (5 N. W. 770); *Austin Western Co.* v. *Weaver Tp.,* 136 Iowa, 709 (114 N. W. 189).

Of course a different question would be presented and a different result might follow if the evidence conclusively showed that the plaintiff was without a cause of action. It must be remembered that a judgment on a directed verdict concludes the controversy; and hence if it is permissible to direct a verdict for a defendant merely because the complaint has omitted some material allegation, which can be supplied by an amendment, and in despite of the fact that the plaintiff has offered evidence which would be sufficient to support a verdict for him if accompanied by a good instead of a bad complaint, it would result in defeating the purpose of amendments and frequently would end in the complete denial of a right by the simple but indefensible act of closing the doors to the truth. If, therefore, the record brought to us contains evidence which, when accompanied by a good pleading and if believed by a jury, would be legally sufficient to support a verdict for the plaintiff, then it was error to allow the motion for a directed verdict on account of any failure of the complaint to allege that the defendant knew or ought to have known that it furnished a defective wrench.

6. There are other facts to be taken into consideration in addition to those already stated. Daniel F. Stewart the general manager of the defendant testified that no tools except a jack and a handle for it and a tire wrench were furnished for the cabs because the drivers, if supplied with additional tools, sometimes tampered with the motors. Stewart stated that, besides the tools already named, each taxicab was furnished with chains which were also kept under the front seat. Ridley testified that along with the enumerated tools and the chains "sometimes there is a tire

change and something like that" under the front seat. Among the employees of the defendant were a "garage-man," a "tire-man" and a master mechanic. Stewart told the jury that the "garage-man supplies the cars"; and he also explained that it was the duty of every driver to report ten minutes previous to the time for his departure and "to investigate and see whether he has the proper tools and also the proper amount of air pressure in each of his tires." Ridley stated that he was "hired to drive the car"; and while he admitted that there was a "sign on the wall right where the air pressure gauge is, to put 80 pounds of air in the car before it left there," he denied that his duties included that of ascertaining whether the car was supplied with the proper tools. The plaintiff asserted that a jack and a handle and a tire wrench "are supposed to be in that car all the time." The manager testified that "when a driver has a wrench out if he springs it he brings it back and gives it to the tire-man and the tire-man gives him another one and the old wrench is given by the tire-man to the master mechanic who, after they are sprung, takes that end off and puts on a new end to it."

And when the same witness was asked: "Where do you get these wrenches?" He answered thus: "Well, the lower part of the wrench there, our master mechanic makes crome nickel steel."

M. J. Marsh said that parts can be welded on a worn wrench "so that it can be made practically new until it gets worn again," and "that had been done to that particular wrench, but it had worn off again."

The court cannot say as a matter of law that the evidence recorded in the transcript is insufficient to sustain a verdict for the plaintiff. The case presented by this appeal is not entirely like that large class of cases where the employer furnishes a number of tools of the

same kind and the servant is expected to select one of them whenever needed. There is testimony to the effect that each taxicab was always equipped with a tire wrench and a jack and with no other tools. It is conceded by the defendant that "the garage-man supplied the cars." The evidence is conflicting as to whether it was the duty of the plaintiff to see that the garage-man had performed his duty. There is evidence relating to the repair of the alleged defective wrench. It was dark when the accident happened. The plaintiff says in substance that each car was supposed to be supplied with a jack and a wrench. When he raised the seat he found the tools which he expected to find. Ridley says that he did not know that two wrenches were in the "tool-box"; and he says, too, that he had not driven this car before. If he found what he expected to find and if he did not know that a second wrench was in the "tool-box" and if it was dark and if he hurried the court cannot say as a matter of law that Ridley was himself negligent in not observing the defect in the socket of the first wrench or in not hunting for and finding the second wrench and using it at the first; nor can the court say as a matter of law that the defendant was or was not negligent.

The trial court correctly decided that the facts did not bring the plaintiff within the Employers' Liability Act (Laws 1911, Chapter 3). Inasmuch as we assume that the plaintiff desires to amend his complaint, we do not attempt to decide whether a common-law liability is sufficiently pleaded. The plaintiff may apply to the Circuit Court for permission to amend the complaint.

The judgment is reversed and the cause is remanded for a new trial. REVERSED AND REMANDED.

McBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

Argued November 22, 1918, reargued January 9, judgment for relator January 14, 1919.

STATE Ex Rel. v. KELLAHER.

(177 Pac. 944.)

Constitutional Law—Amendment of State Constitution—Submission and Adoption.

1. Article II, Section 14–a, of the Constitution, adopted June 4, 1917, relative to the time of municipal elections, *held*, properly submitted by the legislature, and legally adopted, as required by Article XVII, Section 1.

Constitutional Law—Self-executing Provisions—Municipal Elections.

2. Article II, Section 14–a, of the Constitution, as to time of municipal elections, adopted June 4, 1917, *held* of its own force to have changed date of next succeeding municipal election of City of Portland from June 2, 1919, to November 5, 1918.

[As to self-executing provisions of the Constitution, see note in Ann. Cas. 1914C, 1116.]

Municipal Corporations — Commissionership — Election to Fill Unexpired Term—Charter.

3. Under Charter of City of Portland, sections 21, 30, 64, 123, commissioner appointed July 2, 1917, to fill vacancy by resignation in four-year commissionership lasting until June 30, 1919, *held* not entitled to office as against commissioner elected "at the next general municipal election," November 5, 1918, date set by Article II, Section 14–a, of the Constitution, adopted June 4, 1917, charter contemplating election to fill unexpired term.

McBRIDE, C. J., and BEAN and BENNETT, JJ., dissenting in part.

Original proceedings in Supreme Court.

In Banc.

This is an action in *quo warranto* brought in this court to determine whether the relator or the defendant is the person rightfully entitled to hold the office of commissioner for an unexpired term ending June 30, 1919. At a general municipal election held June 7, 1915, George L. Baker was elected to the office of commissioner of the City of Portland for a term of four years beginning July 1, 1915, and ending June 30, 1919. Baker resigned June 29, 1917, and on July 2, 1917, defendant Kellaher was appointed by the city

council to fill the vacancy. Sections of the city charter bearing upon the matter here in issue are as follows:

"Sec. 21—Elective Officers:

"There shall be no elective officers of the City of Portland other than the Mayor, four Commissioners and the Auditor. All said officers shall be elected at large by the legal voters of the City of Portland and for a term of four years, except as provided in Sections 30 and 123 of this Charter."

"Sec. 22—Qualifications:

"The Mayor and every Commissioner shall be a citizen of the United States and of the State of Oregon, and shall have been a resident of the City of Portland for a period of not less than three years immediately preceding the beginning of his term. If any Mayor or Commissioner shall be chosen without such qualifications or shall cease to have the same, the office shall immediately become vacant."

"Sec. 29—Vacancy in Office:

"A vacancy shall exist when the Mayor or a Commissioner fails to qualify by taking the oath and filing the bond on or before July 1 following his election or within ten days after notice of appointment to fill a vacancy, dies, resigns, is removed from office, is convicted of a felony, is judicially declared a lunatic, or is judicially convicted of corruption, malfeasance or delinquency in office. A vacancy shall also occur when the Mayor or a Commissioner absents himself from his duties or from the City of Portland without the consent of the Council expressed by ordinance for more than thirty days in any one year. The pay of the Mayor or any Commissioner shall cease after thirty (30) days' absence from the city, but the Council may grant leave of absence without pay for a further reasonable period, upon good cause being shown. No act of the Council in which any member participated whose office was vacant at the time, as herein provided, shall be for that reason invalid, unless the vacancy shall have been previously ascertained and

declared by act of the Council or judgment of a court."

"Sec. 30—Manner of Filling Vacancies:

"If a vacancy occur in the office of Mayor or Commissioner the Council shall appoint an eligible person to fill such vacancy until the next general municipal election."

"Sec. 123—Municipal Elections:

"A municipal election shall be held on the first Monday in June, 1913, and on the first Monday in June on each second year thereafter, which shall be known as the general municipal election. All others shall be known as special municipal elections. The first general municipal election under this Charter shall be held on the first Monday in June, 1913, for the purpose of electing a Mayor, four commissioners and an auditor. The Mayor and the two commissioners who receive the highest votes shall hold office until the first day of July, 1917, and the Auditor and the other two commissioners shall hold office until the first day of July, 1915. Thereafter every such officer shall hold office for the full term of four years. Such elected officers shall assume office the first day of July after the election."

Section 14–a of the Constitution of Oregon adopted June 4, 1917, provides:

"Incorporated cities and towns shall hold their nominating and regular elections for their several elective officers at the same time that the primary and general biennial elections for state and county officers are held, and the election precincts and officers shall be the same for all elections held at the same time. All provisions of the charters and ordinances of incorporated cities and towns pertaining to the holding of elections shall continue in full force and effect except so far as they relate to the time of holding such elections. Every officer who, at the time of the adoption of this amendment, is the duly qualified incumbent of an elective office of an incorporated city or town shall hold his office for the term for which he was elected

and until his successor is elected and qualified. The legislature, and cities and towns, shall enact such supplementary legislation as may be necessary to carry the provisions of this amendment into effect."

Chapter 422, p. 894, Laws 1917, provides for a special election for a vote on all measures enacted by the legislative assembly and submitted to the people, and also all amendments to the Constitution proposed by the legislature and submitted to the people, with certain exceptions which do not include the amendment here considered.

Section 1 of Article XVII of the Constitution, among other matters, provides:

"Any amendment or amendments to this constitution may be proposed in either branch of the legislative assembly, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the secretary of state to the people for their approval or rejection, at the next regular general election, except when the legislative assembly shall order a special election for that purpose."

After the adoption of Section 14–a, June 4, 1917, the city council of Portland passed Ordinance No. 34,638, providing that a city election should be held on November 5, 1918, to conform to the provisions of Section 14–a, and providing the manner in which said election should be conducted. At said election the relator was a candidate for the supposed vacancy from November, 1918, to June 30th following, and receiving a plurality of the votes cast a certificate of election was issued to him. Defendant claiming that he was entitled to hold the office until June 30, 1919, relator instituted this action to determine the title to the office.

Defendant contends on these grounds:

1st. That Section 14–a was not properly submitted and adopted.

2d. That, conceding its adoption, it is not self-executing but remains in abeyance until the city council shall pass legislation to make it effective.

3d. That there is no authority granted either by the city charter or ordinances or general laws whereby unexpired terms can be filled by election by the voters.

JUDGMENT FOR RELATOR.

For the plaintiff there was a brief over the names of *Mr. Gus C. Moser, Mr. Walter P. La Roche,* City Attorney, *Mr. Walter H. Evans,* District Attorney, and *Mr. C. C. Hindman,* with oral arguments by *Mr. Moser* and *Mr. La Roche.*

For defendant there was a brief and an oral argument by *Mr. Wilson T. Hume.*

There was a brief submitted *amici curiae* by *Mr. A. L. Leavitt* and *Mr. R. C. Groesbeck.*

McBRIDE, C. J.—We consider these matters in their order.

1. The joint resolution proposing the amendment designated as Section 14–a was signed by the speaker of the House and president of the Senate on February 19, 1917, and on February 20th was filed with the Secretary of State. Subsequent to the passage and signature by the presiding officers of the joint resolution but upon the same day (February 19, 1917) Senate Bill 318, providing for submission, was passed by the Senate, sent to the House and there amended and returned to the Senate, which concurred in the amendments, and the act was signed by both presiding offi-

cers, and on February 21, 1917, was presented to the Governor for his approval and by him approved, and became a law on that date. It is the last expression of the legislative will on the question of the submission of this measure and seems to be in accord with Section 1, Article XVII, of our Constitution, and we hold that the amendment was properly submitted and passed.

2. This being settled the next question that confronts us is as to the effect of the amendment upon that section of the existing charter of the City of Portland, which provides for the time of holding city elections. A constitutional provision may be self-executing as to part of its provisions and require the aid of legislation as to others. So far as it relates to the date upon which elections are to be held the amendment is definite, self-executing and mandatory. "Incorporated cities and towns *shall* hold" their elections at the time therein specified. And again, "All provisions of the charter and ordinances of incorporated cities and towns pertaining to the holding of elections, shall continue in full force and effect *except so far as they relate to the time of holding such elections.*" The implication being that as to the *time* of holding such elections such charters were repealed. There can be no logical escape from this conclusion. The requirement that cities and towns should enact such supplementary legislation, as might be necessary to carry the provisions of the amendment into effect, is also mandatory and was no doubt passed so as to require such corporations to provide the machinery necessary to carry on the election at the date specified. To prevent a vacancy occurring in any elective office between a possible earlier date for city election and the time for holding the general state election, it was

provided that elective officers then in office should hold until their successors were elected and qualified; so that, if in a city theretofore holding its election, say in June, there were elective officers whose terms expired in June, such terms were by force of the amendment extended until November 5th, and until their successors had qualified.

The power of the council to appoint a person to fill a vacancy in the office of commissioner is limited by Section 30 of the charter to an appointment to hold "until the next general municipal election." Under the charter as it stood before the change made by the amendment, that election would have been held in June, 1919, but this period was abridged by the amendment, as well as by Ordinance No. 34,638 of the City of Portland, so that the city election occurred on November 5, 1918, instead of June, 1919, thus, apparently, leaving a *hiatus* or vacancy in the office of the appointive commissioner from November 5, 1918, until July 1, 1919. There is nothing in the charter or ordinances of the city authorizing an election to fill out any portion of an unexpired term of a commissioner, excepting the provision authorizing an appointment by the council to be effective until the next regular municipal election. This provision was evidently drawn upon the theory that elections would continue to be held in June and in the event of the occurrence of an unexpired term, the place of a person serving for such unexpired term by appointment would be filled by a commissioner elected at the municipal election, who, by the provisions of the charter, would hold for four years, such term beginning July 1st. When the council made provision by Ordinance 34,638 for a general municipal election, it made no provision either by a proposed amendment to the charter, or otherwise,

for an election to supply the *hiatus* between November 5, 1918, and July 1, 1919, and it is a significant fact that while no provision is made for filling an unexpired term of a commissioner by election by the people, Section 64 of the charter, which relates to the office of city auditor, provides that he shall be elected and serve for a term of four years; that if a vacancy shall occur in his office, it shall be filled by appointment by the council until the next general election, when it shall be filled by election for the remainder of the unexpired term. So it appears that the question of "unexpired terms" was in the legislative mind at the time the charter was adopted, and this being so the fact that the framers provided for an election to fill the unexpired term of the auditor and omitted to make such provision in respect to such terms in the office of commissioner, must be taken under the maxim "*inclusio unius exclusio alterius*" to indicate that it was not the intention of the framers of the charter to provide for an election to fill an unexpired term in the office of commissioner. The date of election was fixed by the charter upon the first Monday in June of each year. Section 123 of the charter of 1913 provided that the mayor and the two commissioners first elected should hold office until the first day of July, 1917, and that the other two commissioners should hold office until July 1, 1915, and thereafter every such official should hold office for the full term of four years. A strict literal construction of the last clause would leave a vacancy in the office of commissioner at every subsequent election from the first Monday in June until July 1st, but a fair construction of the section we think indicates an intention on the part of the framers of the charter that the commissioners in office

should hold until July 1st following the election. Indeed this would seem to be the necessary result from the provisions of Section 1, Article XV, of our Constitution, which provides that:

"All officers, except members of the legislature, shall hold their offices until their successors are elected and qualified."

This provision is discussed in *State ex rel.* v. *Simon*, 20 Or. 366 (26 Pac. 170), and there held applicable to offices created by city charter. It is true the charter there considered was one granted by the legislature before the adoption of the present amendment to Section 2, Article XI of the Constitution, commonly called the Home Rule Amendment, and that the present charter was one enacted by the people of the City of Portland subsequent to such amendment. The amendment expressly provides that charters enacted thereunder shall be "subject to the Constitution and criminal laws of the State of Oregon," so that it is conceived that Section 1 of Article XV of the Constitution is just as applicable to city offices created by initiative charters as to those created by legislative fiat. It would seem naturally to follow, therefore, in the present instance that the City of Portland having failed to provide by charter or ordinance for an election to fill the vacancy from November 5, 1918, the time fixed by the amended Constitution for holding the city election, until July 1, 1919, when Baker's successor is entitled to take the office, and Kellaher being lawfully in the office continues to hold until his successor is qualified. Even in the absence of constitutional warrant for holding over after the period prescribed by the charter, the writer is of the opinion that Kellaher would hold over *ex necessitate*, and there is respectable authority holding that where

through inadvertence no legislative provision has been made for filling an office beyond the prescribed term, the law from motives of sound public policy will imply that the incumbent may continue to exercise his official duties until his successor is elected and qualified: Throop on Public Officers, § 325; Mechem on Public Offices, § 397; *People* v. *Stratton,* 28 Cal. 44.

The intention of the framers of the charter seems to the writer to have been to provide for filling the office by appointment until the successor for the full term should have been elected and qualified. The dates when these things would happen were determined by the time of holding the election (first Monday in June), and the time when the person elected should assume the duties of his office (July 1st following), so when the charter prescribed that the person appointed to fill a vacancy should hold until the next general election, it in effect and intent prescribed that he should occupy the office until his successor was elected and qualified because as the law then stood these dates coincided. The change made by the constitutional amendment did not create two vacancies in the same office, but merely extended the duration of the vacancy to be filled, the intent of the framers of the charter being that a person appointed to fill a vacancy should hold until his successor for a full term had been elected and qualified. That intent can be best effectuated by disregarding the letter of the charter and enforcing its spirit by construing it as above indicated.

The cases of *State ex rel.* v. *Johns,* 3 Or. 533, and *State ex rel.* v. *Ware,* 13 Or. 380 (10 Pac. 885), do not support plaintiff's theory. There the Constitution provided for an election to fill the vacancy while here we have no provision whatever for such an election. In both these cases the decision turned upon whether

the persons elected held for full terms or for the unexpired portion of the terms of their predecessors. There was never any question as to the right to elect to fill an unexpired term. Here we have a municipality with no power to do anything beyond the actual or implied grant of authority contained in its charter and in that charter we find no authority to elect a commissioner for a portion of a term. To hold that a city has inherent power to fill vacancies by election without any legislation granting such authority, would be going further than any case which has come to the writer's notice has ventured.

It may be said that Section 125 of the charter of 1913 by implication provides for an election to fill an unexpired term. This section among other things requires that "the auditor on or before the 15th day before every election shall prepare and file in his office a certificate containing a complete list of the offices to be filled, stating whether for a full or an unexpired term," but in the judgment of the writer this can logically refer only to an office wherever election for an unexpired term is provided for, as in Section 64, *supra*.

Section 29 of the Charter of 1913 defines a vacancy in the office of mayor or commissioner as follows:

"A vacancy shall exist when the mayor or a commissioner fails to qualify by taking the oath and filing bond on or before July 1 following his election, or within ten days after notice of his appointment to fill a vacancy, dies, resigns, is removed from office, is convicted of a felony, is judicially declared a lunatic, or is judicially convicted of corruption, malfeasance or delinquency in office," etc.

It is conceded that defendant was lawfully appointed to the office of commissioner to succeed George

L. Baker, and none of the contingencies above enumerated have happened so it logically follows that under the terms of the charter there was no vacancy to be filled in the office of commissioner when the election of 1918 was held. The proclamation of the Governor declaring the result of the vote on Section 14–a, *supra*, was dated July 2d, the same day upon which defendant was chosen as commissioner to succeed Baker. The proclamation was the last final act necessary to make the amendment effective, and the amendment became a part of the organic law from that date: Article XVII, Section 1, of the Constitution. Whether we construe the words "from the date of such proclamation" as exclusive or inclusive, a question which may be said to be fairly debatable, there can be little question that the adoption of the amendment found defendant in office and that if he can be said to have been in an elective office he held over until his successor was elected and qualified.

Speaking generally, the office of commissioner of the City of Portland is undoubtedly an elective office and Kellaher was an incumbent of that office. The fact that he had been chosen by the council to fill a vacancy in the office did not change the quality of the office itself. It still remained elective in character even though occupied by a person chosen to hold it temporarily by a body other than the whole electorate. So the whole question, whether Kellaher held over until July 1, 1919, depends upon whether or not there is authority in the charter for holding a special election to fill the remainder of Baker's unexpired term from November 5, 1918, to July 1, 1919. As stated before the writer fails to find such authority in that instrument. It may not be inappropriate to here call attention to Section 129 of the Charter of 1913,

which provides substantially the form of ballot to be used at such elections and the instructions to voters which shall be printed thereon. Among other directions as to what is to appear under this head is the following:

"Here state officers to be elected, as mayor and two commissioners, or auditor and two commissioners."

While the circumstance is not conclusive it is valuable and indicates it was never in the legislative mind that under any contingency more than two commissioners could be chosen at the same election. This fact, considered with the fact that in another section of the charter heretofore noticed provision was made for the election of an auditor to fill an unexpired term, has—in the judgment of the writer—great weight as indicating that it was not the intention of the committee who framed the charter or the electorate who adopted it to provide for an election to fill an unexpired term in the office of commissioner.

A judgment should be entered declaring defendant lawfully entitled to hold the office of commissioner until July 1, 1919.

BEAN and BENNETT, JJ., concur.

HARRIS, J.—I agree with both the reasoning and the conclusion of Mr. Chief Justice MCBRIDE that the amendment to the Constitution, designated as Article II, Section 14–a, was properly submitted and was legally adopted; and that by its own force the amendment changed the date of the next succeeding general municipal election for Portland from June 2, 1919, to November 5, 1918. However, I am of the opinion that T. L. Perkins was legally elected and is entitled to hold the office of commissioner until July 1, 1919.

3. Whether Perkins or Kellaher is entitled to hold the contested position depends upon whether the charter authorizes an election to fill out an unexpired term. The amendment to the Constitution changed the date of the regular municipal election; but we must look to the charter to ascertain what officers are regularly elected, the duration of the terms for which they are chosen, and whether a vacancy caused by resignation involves not only a vacancy in the office but also a vacancy in the term of the person who resigned.

George L. Baker was elected a commissioner on June 7, 1915, for the full term of four years. His term commenced on July 1, 1915, and he assumed the office on that date. He resigned on June 29, 1917, and the council appointed Dan Kellaher. If Baker had continued to serve until the end of the term for which he was elected he would serve until and including June 30, 1919, and if the date of municipal elections had not been changed his successor would be elected on the first Monday in June, 1919; but because of such change in the date of municipal elections some person was elected on November 5, 1918, for the full term of four years commencing on July 1, 1919.

In addition to choosing a successor of Baker to hold for the full term of four years, which shall begin on July 1, 1919, the people of Portland, at the election held on November 5, 1918, elected T. L. Perkins to fill out the remainder of Baker's unexpired term. This unexpired term is the so-called short term and covers the period which began on November 5, 1918, and ends with June 30, 1919. It is conceded by all parties that Kellaher was legally appointed by the council and that he lawfully occupied the position of commissioner until November 5, 1918. Perkins claims that the term for which Kellaher was appointed ended on November

5, 1918, and that the charter authorized the legal voters to elect a person of their own choice to fill out the remainder of Baker's unexpired term. Kellaher contends that he is entitled to hold as appointee until and including June 30, 1919, and that the charter does not contain any provision for filling out an unexpired term by an election. We must look to the charter for a solution of the problem; for the controversy must be determined by the language of that instrument.

An examination of the charter of Portland will be made easier if attention is first directed to certain legal principles deemed to be controlling. The theory of the common law involved the idea that the king was the source of all power and the disposer of all offices; and hence whenever a vacancy occurred in a public office the office reverted to the king again to be filled. All public offices were granted on good behavior and no public office could be granted for a definite number of years or a term; and consequently there could be no vacancy in a term and no such thing as an unexpired term.

In this country where the people are the source of all power we have laws, organic or statutory, which provide for elective public officers with fixed terms. Almost invariably these fixed terms begin and end on specified dates. The term of an office means the period prescribed for holding the office and is the estate or interest which the incumbent has in it; and, therefore, when the holder of an office dies, resigns or is removed, his estate or interest ends, his term is usually dissolved, and the office becomes vacant and reverts to the people, the source from whence it came, again to be filled by them. Since the term of an elected incumbent ends with his death, resignation or removal, the vacancy which results is a vacancy in the

office rather than in the term and consequently when the office reverts to the people to be filled by another election the rule is that the newly elected person holds not merely during the unexpired term of his predecessor but for the full term prescribed for the office, unless some written law, organic or statutory, by express provision or manifest intent limits and restricts the tenure of the new incumbent to the unexpired term of the previously elected incumbent. In brief, under the common law of England the resignation of an officer resulted in a vacancy in the office; but the resignation did not leave an unexpired term. In this country the resignation of an officer results in a vacancy in the office, and the general rule is that the resignation does not leave an unexpired term to be completed before a new full term can begin. This general rule, like most general rules, has its exceptions. If a written law creating an office and prescribing the term contains an express provision or clearly manifests an intent that an unexpired term shall be first completed then the resignation of an elected incumbent leaves an unexpired term which must first be filled out before the office can be filled for a full term: *State ex rel.* v. *Johns,* 3 Or. 533, 538; *State ex rel.* v. *Ware,* 13 Or. 380, 386 (10 Pac. 885). Is it the manifest intent of the charter that the unexpired term of a commissioner shall be filled out before another full term of four years shall begin? When considering the plan of the charter we may keep in mind a rule which is applicable to the facts presented here and is aptly expressed in 22 R. C. L. 552 thus:

"And it seems the term of office of one elected or appointed to fill a vacancy in a board of several officers will be held to be for the unexpired term only, where the clear intent of the creating power is that the entire board should not go out of office at once, but

that different groups should retire at regularly recurring intervals."

If Kellaher's appointment ended with "the next general municipal election," which occurred on November 5, 1918, and if the charter contemplates an election to fill out an unexpired term then Perkins and not Kellaher is entitled to hold the office of commissioner until Baker's unexpired term will have ended on June 30, 1919; otherwise Kellaher is the lawful incumbent.

The present charter of Portland was enacted by the legal voters of the city in the exercise of the initiative and is entitled:

"An Act to amend an Act of the Legislative Assembly of the State of Oregon entitled, 'An Act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,'" filed in the office of the Secretary of State, January 23, 1903, amended by the Legislative Assembly of the State of Oregon in 1905 and subsequently amended by the people of the City of Portland, providing for a commission form of government."

Sections 21, 30, 64 and 123 of the charter are material to the discussion and for that reason are here set down in full:

"Sec. 21—Elective officers:

"There shall be no elective officers of the City of Portland other than the Mayor, four Commissioners and the Auditor. All said officers shall be elected at large by the legal voters of the City of Portland and for a term of four years, except as provided in Sections 30 and 123 of this Charter.

"Sec. 30—Manner of Filling Vacancies:

"If a vacancy occur in the office of Mayor or Commissioner the Council shall appoint an eligible person

to fill such vacancy until the next general municipal election.

"Sec. 64—Qualifications—Filling Vacancy in Office:

"There shall be an Auditor of the City of Portland who shall possess the same qualifications required of a Commissioner and in addition those of an expert accountant. He shall be elected at the general municipal election and shall serve for a term of four years.

"If a vacancy occur in the office of Auditor the Council shall appoint an eligible person to fill such vacancy until the next general election subject to the provisions of law with respect to the recall of officers, and also subject to the provisions of this Charter declaring when a vacancy shall exist; the person appointed to fill such vacancy must within five days from the date of appointment or election qualify therefor as in the case of an officer elected for the full term or he shall be deemed to have declined and the office shall be considered vacant. Any such vacancy shall be filled at the next general municipal election for the unexpired term.

"Sec. 123—Municipal Elections:

"A municipal election shall be held on the first Monday in June, 1913, and on the first Monday in June on each second year thereafter, which shall be known as the general municipal election. All others shall be known as special municipal elections. The first general municipal election under this Charter shall be held on the first Monday in June, 1913, for the purpose of electing a Mayor, four Commissioners and an Auditor. The Mayor and the two Commissioners who receive the highest votes shall hold office until the first day of July, 1917, and the auditor and the other two Commissioners shall hold office until the first day of July, 1915. Thereafter every such officer shall hold office for the full term of four years. Such elected officers shall assume office the first day of July after the election."

It will be observed that Section 21 provides for only six elective officers: A mayor, an auditor, and four commissioners. "All said officers" shall be elected for the full term of four years, except as provided in Sections 30 and 123. Section 30 provides for an appointment to fill a vacancy and Section 123, among other things, directs that the auditor and two of the commissioners chosen at the first election shall hold for two years. It will be noticed, too, that Section 123 declares that "such elected officers" meaning the officers chosen at the first election and those subsequently chosen for the full term of four years, "shall assume office the first day of July after the election." This is only one way of saying that an officer chosen for the full term of four years cannot as such elected officer assume office before the first day of July after the election. If we now turn to Section 30 we shall see that it empowers the council to fill vacancies occurring in the office of mayor or commissioner; but this power of appointment is limited and restricted so that the vacancy is filled "until the next general municipal election." Manifestly it was the intention of the framers of the charter and of the people who voted for it to restrict the appointing power of the council within the narrowest limits: *State ex rel.* v. *Johns,* 3 Or. 533, 535. If the plan of the charter contemplates the filling of a vacancy by the election of a person for the full term of four years, which according to Section 123 does not and cannot commence until July 1st, after the election, it is likely that appropriate language would have been employed as was used in the legislative charter of 1903 (Special Laws 1903, sec. 38), to indicate that the appointee should hold until July 1, after the election. But Section 30 uses the words "until the next general municipal election,"

which is equivalent to saying that the term of an appointee of the council shall end on the day of the next general municipal election; and, therefore, since a person elected for the full term of four years cannot assume the office until the first day of July after the election, the necessary and inevitable result is that there is an interregnum between the date of the "next general municipal election" and the first day of July after the election; and the very fact that such an interregnum would inevitably exist every time the office of commissioner becomes vacant is of itself a sign indicating that it is the intent of the charter to provide for the selection of a person at the "next general municipal election" to serve out the unexpired term.

It must be admitted, of course, that Kellaher holds over until his successor is elected and qualified; and hence if no person has been legally elected for the so-called short term, then Kellaher would hold until and including June 30, 1919.

Unless Perkins was legally elected, there are at least two adequate reasons for the conclusion that Kellaher is entitled to continue in the office until July 1, 1919: (1) The rule of necessity; Mechem's Public Officers, § 397; and (2) a provision contained in Article II, Section 14–a, of the Constitution. Probably a third reason may be found in the language of Article XV, Section 1 of the Constitution as construed and applied in *State ex rel.* v. *Simon,* 20 Or. 365, 377 (26 Pac. 170).

It has been contended that the amendment to the Constitution, Article II, Section 14–a, is determinative of the question for decision. This contention is based upon the fact that Kellaher's term began simultaneously with the commencement of the operation of the amendment. It will be assumed, but it is not decided,

that the amendment became effective on the day the Governor issued his proclamation. Kellaher qualified and assumed the office of commissioner on July 2, 1917, and on the same day the Governor issued his proclamation declaring that the amendment had been adopted as a part of the Constitution. The amendment did not become effective until July 2, 1917; Article XVII, Section 1 of the Constitution; *Phy* v. *Wright*, 75 Or. 428, 433 (146 Pac. 138, 147 Pac. 381); and therefore Kellaher's term and the operation of the amendment commenced on the same day; and since the law does not generally divide a day into fractions it may be assumed that Kellaher was an "incumbent of an elective office" at the time of the adoption of the amendment. It may also be assumed, for the purposes of the present discussion, that Kellaher was "elected" within the meaning of that term as construed in *State ex rel.* v. *Compson*, 34 Or. 25 (54 Pac. 349). The amendment (Article II, Section 14–a), contains the following sentence:

"Every officer who, at the time of the adoption of this amendment, is the duly qualified incumbent of an elective office of an incorporated city or town shall hold his office for the term for which he was elected and until his successor is elected and qualified."

Now, this language merely retains Kellaher in office "for the term for which he was elected" and then continues his tenure "until his successor is elected and qualified." If the term for which Kellaher was "elected" ended on November 5, 1918, then he has held for the period guaranteed by the Constitution. The words "until his successor is elected and qualified" of themselves imply that at some time somebody can and will be elected to succeed the incumbent. If the charter contains authority for an election of a

commissioner for an unexpired term then by electing Perkins the people did in truth elect a successor and therefore when Perkins qualified Kellaher's tenure ended because his successor had been elected and qualified. The amendment does not attempt to say whether an election can or cannot be held. Indeed, the Constitution assumes that an election can be held but of course with the limitation that "nominating and regular elections" shall be held at the same time that primary and general biennial elections for state and county officers are held. The amendment to the Constitution does not attempt to say whether the legal voters had authority to elect Perkins to fill an unexpired term. The Constitution leaves the decision of that question to the charter; and, hence the authority for that election, if it exists at all, must be found in the charter. The amendment merely continues the tenure of Kellaher until such time, as under the charter, a successor can be and is elected. An election was held on the date fixed by the Constitution, and therefore if the charter empowered the people of Portland to elect a person of their own choice to fill out Baker's unexpired term then Perkins is entitled to the office because he then becomes the "successor" spoken of in the amendment. The question for decision is not whether Kellaher would lawfully hold over if no person had been elected for the unexpired term but whether Kellaher can hold over in despite of the fact that Perkins has been elected. Did the term for which Kellaher was appointed end on November 5, 1918; and if the term for which he was appointed did so end, does the charter authorize the legal voters to elect some person to fill out the remainder of Baker's unexpired term?

If we now pass to Section 123 we shall see that it was the clear intent of the framers of the charter that the six elective officers should not go out of office at one and the same time; but that it is the plan of the charter that the mayor and two commissioners shall be chosen at one election and that the auditor and two commissioners shall be chosen at the next election. The first municipal election was held on the first Monday in June, 1913, and at that time the two commissioners receiving the highest number of votes and the mayor were elected for four years and the other two commissioners and the auditor were elected for two years; and this section (Section 123) then declares that "thereafter every such officer shall hold office for the full term of four years." The evident purpose of this provision was to cause the retirement and election of two commissioners every two years. That such is the intent of the charter is further evidenced by the language found in Section 129 which specifies the form of the ballot to be used at the elections. Among other things this section directs that the ballot shall "here state officers to be elected, as mayor and *two commissioners, or* auditor and *two commissioners.*" If, however, a commissioner cannot be elected to fill an unexpired term but must always be elected for the full term of four years it is possible to destroy the intent and plan of the charter that two commissioners should be elected every two years.

It must be conceded that a town or city must have a charter and that only those powers which are contained in the charter can be exercised. But there is a section in the charter which enables the voters to fill an unexpired term by an election; for we read in Section 125 that:

"The auditor on or before the fifteenth day before every election, shall prepare and file in his office a certificate containing a complete list of the offices to be filled, *stating whether for* a full or *an unexpired term*, and the candidates for each office who are entitled to have their names appear upon the ballot."

It may be argued that the words "an unexpired term" in Section 125 refer exclusively to Section 64, which in express language provides for the election of an auditor to fill an unexpired term. It may be admitted that the fact that Section 64 is the only section which in direct and express language provides for an election for an unexpired term is some argument in support of the contention that the only "unexpired term" contemplated by Section 125 relates to the office of auditor alone; and yet this very same fact is also some argument in support of the theory that it is the intent of the charter that the mayor and two commissioners shall be elected for the full term of four years at one biennial election and that an auditor and two commissioners shall likewise be elected at the succeeding biennial election. Indeed, it seems to the writer that the only purpose which the framers of the charter had in mind when they inserted the last sentence appearing in Section 64 was to preserve the plan, upon which the charter was built, of electing the mayor and two commissioners at one election and the auditor and two commissioners at another election. It must be conceded that if a person is elected to fill an unexpired term for the office of auditor he would be entitled to qualify immediately after the election, because the language of Section 64 only permits the appointee to hold the office as against all persons "until the next general election" and the person elected for the unexpired term would not be obliged to wait until July

1st after the election as in the case of officers elected for the full term of four years. Section 64 and Section 30 employ exactly the same language to express the tenure of an appointee of the council; for the language of each section is "next general municipal election," and this is of itself a sign pointing to the conclusion that the term of an appointee, whether commissioner, mayor, or auditor, ends on the day of the "next general municipal election" when a successor is to be elected by the people.

Assuming that the charter contemplates that a vacancy shall first be filled by appointment and the appointee shall hold until the next general municipal election when some person shall be elected to fill out the remainder of the unexpired term, then, prior to the adoption of the amendment to the Constitution, the duration of that remainder of such unexpired term was either two years and one month or only about one month, depending upon whether the next general municipal election was the first or second election after the commencement of the term. The amendment to the Constitution worked a change in the date of municipal elections with the result that in Portland a corresponding change was effected in the period of time to be served by any person elected to fill out the remainder of an unexpired term. The amendment did not create unexpired terms where none existed before, although it did have the effect of changing the length of the period of time to be served by an officer elected to complete an unexpired term.

The conclusion here reached is supported by the opinion of Mr. Justice LORD in *State ex rel.* v. *Ware*, 13 Or. 380 (10 Pac. 885). In 1878 (Laws 1878, p. 31), the legislature, acting upon the authority of Article VII, Section 10, of the Constitution, enacted a statute providing

for the election of supreme and circuit judges in distinct classes, commencing with the first Monday in June, 1880. James F. Watson was elected circuit judge of the second judicial district in June, 1880, and held the office until February 2, 1882, when he resigned. The Governor appointed John Burnett to fill the vacancy and he held the office until the first Monday in July, 1882, when he was succeeded by Robert S. Bean, who had been elected in June, 1882. Joel Ware was county clerk of Lane County and, when preparing the election notices for the election to be held in June, 1886, he refused to name the office of circuit judge as one of the offices to be filled at such election. A proceeding was then commenced for the purpose of compelling the clerk to correct the notices of election by naming the office of circuit judge as one of the positions to be filled at the general election. The question for decision was whether Robert S. Bean had been elected for an unexpired term of four years or whether when elected in 1882 he was chosen for the full term of six years. The solution of the problem depended upon the language of the Constitution. Article VII, Section 2, of the Constitution provided for the selection of four justices who performed both circuit and appellate duty. Section 3 of the same article declared that the judges first chosen under the Constitution should:

"Allot among themselves their terms of office, so that the term of one of them shall expire in two years, one in four years, and two in six years, and thereafter one or more shall be chosen every two years, to serve for a term of six years."

Section 4 provided that:

"Every vacancy in the office of judge of the Supreme Court shall be filled by election for the re-

mainder of the vacant term, unless it would expire at the next election, and until so filled, or when it would so expire, the Governor shall fill the vacancy by appointment."

It is obvious that Section 3 did no more than to fix the term of office and to command the supreme judges first chosen to allot among themselves their terms of office. It will be noted that Section 4 in express and unequivocal language directed that every vacancy in the office of judge of the Supreme Court should be filled by election for the remainder of the vacant term. There as here the officers first elected held for different terms, but their successors held for the same terms. There as here the written law confers the power of appointment to fill a vacancy. There as here an elected officer resigned. There as here the vacancy was first filled by an appointment. There as here the question was whether the resignation left a vacancy in the term as well as a vacancy in the office. In all its essential features that case is parallel to this case. Mr. Justice LORD ruled that even though Section 4 was entirely erased from the Constitution, nevertheless Section 3 would work the same result that was accomplished by Section 4 so far as the judges of the Supreme Court were concerned. We herewith quote at length from the opinion of Mr. Justice LORD, for the reason that the language used by him is particularly pertinent to the facts presented here.

"Blot out the limitation which it (Section 4) imposes upon the term given by Section 3 when a vacancy occurs, and it is freely admitted, in the case of a vacancy, that the circuit judges, whenever elected, would be elected and entitled to hold for the full term of six years; but a like effect would not result to the supreme judges upon such a contingency, for the rea-

son that it would violate the purpose for which the terms of these judges were required to be allotted. But it is argued that the object of Section 4 in confining vacancies to be filled to the residue of the vacant term was for the purpose of preserving the allotment prescribed by Section 3, which the supreme judges were required to make; and as Section 10 provided that the circuit judges shall hold their terms without allotment, therefore, say counsel, Section 4 does not apply to them. The object of an allotment undoubtedly is to provide that officers sitting in the same body shall go out of office at different periods. Hence it is claimed, to maintain and perpetuate the system established by allotments, when a vacancy occurs, or an officer of such body fails for any reason to hold for his full term, necessarily and logically his successor must hold for the unexpired term of his predecessor. I grant this. But if such is the purpose and intention of an allotment, there is no need of Section 4 to preserve it. The fact that it is provided that such officers composing the body are to allot their terms when first chosen, writes out plainly and unmistakably the intention or object to be subserved by the allotment, and renders unnecessary and needless any declaration or provision to preserve it. What need, then, of Section 4? Erase it from the Constitution, and you do not destroy the allotment or affect the intention for which it was established. The allotment, and the purposes it was intended to embrace, can stand without it. Section 3 provided for the allotment of the terms of the supreme judges, and to preserve the purposes of that allotment, vacancies occurring by reason of death or resignation would have been necessarily and legally limited to filling for the remainder of the vacant term. (See *Baker* v. *Kirk,* 33 Ind. 524.)"

This doctrine also finds support in *State ex rel.* v. *Mayor of La Porte,* 28 Ind. 248; *Parcel* v. *State,* 110 Ind. 122 (11 N. E. 4). See also the cases cited in note to *State ex rel. Fish* v. *Howell,* 50 L. R. A. (N. S.) 345.

As the writer reads the charter, Section 29, which declares when a vacancy shall occur in the office of mayor or commissioner, is not controlling or decisive. The same definition which expressly applies to the office of mayor and commissioner is, by Section 64, expressly made applicable to the office of auditor; and, hence, whatever would constitute a vacancy in the office of commissioner would also constitute a vacancy in the office of auditor. The resignation of a commissioner creates a vacancy just as the resignation of an auditor creates a vacancy. This vacancy in the office of auditor is temporarily filled by appointment until the next "general election" and in the office of commissioner until the next "general municipal election." The vacancy is the same in both cases, since it results from the same cause, and is temporarily filled by the same council and is so filled for a period ending at the same time; and in the case of the auditor this same vacancy which is temporarily filled by appointment until the next general election is at such election permanently filled by the voters for the remainder of the unexpired term; for the language of Section 64 is: "*Such vacancy* shall be filled at the next general municipal election for the unexpired term." And in the case of a commissioner it is this same "such vacancy" which, as it appears to the writer, the voters are to fill at the next general municipal election. After all, however, the intent, plan and purpose of the charter should be determined by a consideration of the instrument as a whole rather than by any mere implication carried by or any bare inference to be drawn from an isolated section of the enactment; and when the charter is taken by its four corners and is read in the light of the rule which was applied in *State ex rel.* v. *Ware* and which has been approved in other jurisdic-

tions, it leads the writer to the conclusion that the voters had the right themselves to choose for themselves a commissioner to complete Baker's unexpired term.

If it is admitted that the words, "Here state officers to be elected, as mayor and two commissioners, or auditor and two commissioners" appearing in Section 129 present a circumstance which "indicates it was never in the legislative mind that under any contingency more than two commissioners could be chosen at the same election," then there is no possible escape from the conclusion that Perkins is entitled to be seated, unless it can be said that an appointee can invariably hold until the end of the unexpired term. A regular election is held biennially; and this is expressly defined by Section 123 as "the general municipal election." If from the time of the first election each officer had served his full term then two commissioners would have been elected regularly every two years; and of course Section 129, when referring to "two commissioners," means the two commissioners who are to be chosen at each election for the full period of four years. Now if the legislative mind intended that under no contingency could more than two commissioners be elected at the same election for the full term of four years then one of only two possible conclusions must be accepted: (1) The people have the right to elect a commissioner to fill out an unexpired term; or (2) the appointee always holds until the end of the unexpired term. This can be demonstrated by an example. At the first election held in June, 1913, two commissioners were elected for terms of four years and two for terms of two years. The term of each commissioner began on July 1, 1913. Two retired from office at the end of June 30, 1915, and the

other two at the end of June 30, 1917. If each of the four commissioners served out his full term then two were elected in June, 1915, and two in June, 1917. Now, suppose that on August 1, 1913, after they had been in office only one month, the two commissioners who had been elected for four years, had resigned. The result would be a vacancy in each of the two offices. The council would have filled the vacancies by an appointment. The "next general municipal election" was held in June, 1915; and at that time two commissioners were regularly elected for the full term of four years to succeed the two commissioners who had been elected at the first election in 1913 for the period ending June 30, 1915. If Section 129 indicates that the legislative mind intended that under no contingency shall more than two commissioners be chosen at the same election for the full term of four years then of necessity the voters were obliged to wait until June, 1917, before they could elect two commissioners for the full term of four years to take the places of the commissioners who had resigned on August 1, 1913. If the vacancies had been filled in June, 1915, by the election of two commissioners for the full term of four years then no commissioner at all would have been elected in 1917 and at the next general municipal election held November 5, 1918, four commissioners would have been elected. On the facts of the supposed case the plan of the legislative mind to elect two commissioners every two years for the term of four years could have been preserved by only one of two possible methods: (1) The voters could have elected two persons to serve out the unexpired term of the two commissioners who resigned; or (2) the appointees of the council could have continued to serve until July 1, 1917. No one has yet advanced the argument that

the appointee of the council is entitled always and under all circumstances to serve until the end of the unexpired term. To sustain any such argument it is necessary under the facts of the supposed case to say that an appointee can as a matter of right hold not only until "*the next* general municipal election" but also, until the second "next general municipal election." The most that has ever been claimed is that the appointee holds until the first day of July following the "general municipal election" which comes next after the appointment. If the appointees who assumed the duties of the office were not entitled to fill out the unexpired terms by holding to the end of June 30, 1917, then we are driven to the alternative conclusion that the people were entitled to fill the vacancies by choosing two persons to fill out the two unexpired terms. If the voters could have filled the vacancies under those supposed facts then they were empowered to elect a person of their choice to complete Baker's unexpired term.

If it is admitted that a vacancy occurring one month after the commencement of a four year term is filled by appointment by the council "until the next general municipal election," and that the people at that election are authorized to elect a person to fill out the remainder of the term, which remainder would in that event amount to more than two years, then by the same token if the vacancy occurs between the first and second elections after the beginning of the term, the appointee would only hold until such second election because it is the "next general municipal election" after the appointment and the people can at that time choose some person to fill out the remainder of the term whether such remainder is one month, as it would have been before the adoption of the amendment to

the Constitution, or whether it is eight months as it will now be because of the time fixed by the Constitution for holding municipal elections. In other words, if the people would have had the right at the June, 1917, election to elect some person to hold the office until July 1, 1919, on the assumption that Baker had resigned and Kellaher had been appointed on August 1, 1915, then by the same reasoning the voters were empowered on November 5, 1918, to elect Perkins to hold until July 1, 1919. The right to elect a commissioner to complete an unexpired term does not depend upon the duration of such unexpired term. It is true that the filling of an unexpired term of one month is not a matter of much importance, and it is probable that seldom if ever would any candidates appear for unexpired terms of one month; but it is also true that the filling of an unexpired term of more than two years is a matter of much importance. And while it may not be a matter of much moment whether Kellaher or Perkins holds until July 1, 1919, yet the time may come when it will be a matter of much importance whether an appointee can hold for three years and eleven months. Every section and every word of the charter which authorizes an election to fill an unexpired term of more than two years is equally applicable to an unexpired term of one month or eight months. Whenever it is admitted that, if Baker had resigned on August 1, 1915, and Kellaher had been appointed by the council on that date, the people could have elected some person in June, 1917, to fill out Baker's unexpired term, then by that admission one is forced by the inexorable compulsion of logic to concede that the people have the same power to elect some person to fill out an unexpired term of eight months.

The period during which an appointee of the council is authorized to occupy the office of commissioner is limited by the words "until the next general municipal election." These words of limitation are plain and unambiguous and signify "to; up to"; they do not mean "after"; and, therefore, an appointee is named to hold "up to" and not "after" the next general municipal election. Any conclusion which denies to the voters the right at such "next general municipal election" to choose some person to take the place of the appointee, does and must, as it seems to the writer, ignore the meaning of the words "until the next general municipal election." On the other hand, as the writer views it, the conclusion that the voters are empowered to elect some person to fill out an unexpired term gives full effect to the unambiguous meaning of the word "until," does not strain or ignore a single word found in the charter, gives full effect to every word in the organic law of the city, does not read into the charter any language not found there, does not disturb the harmony of the charter or mar its symmetry, does not destroy the manifest plan and intent of the charter that different groups of officers should be elected at regularly recurring intervals, and preserves the purpose of the charter that the six elective offices shall whenever and as long as possible be filled by elected rather than by appointed officials.

The defendant contends that Perkins has not been domiciled in Portland for the time required by the charter. It is not necessary to discuss the facts in detail but it is enough to say that on the facts as presented in the record Perkins' domicile is within the boundaries of the City of Portland and has been for the time required.

The judgment should be to the effect that T. L. Perkins is entitled to hold the office of commissioner until and including June 30, 1919.

BENSON, J., concurring.

BURNETT, J. (Concurring Specially).—Under the Portland charter the rule is that the offices of mayor, commissioner and auditor are to be filled by election at large by the legal voters of the city: Section 21. The principal exception is that upon a vacancy occurring in the office of mayor or commissioner the council shall appoint an eligible person to fill the vacancy until the next general municipal election: Section 30. The further exception as outlined in Section 123 has in a sense served its purpose in the initial classification of the commissioners so that an entire change in the personnel of the council will not be effected at any general election. It must, however, be counted as a factor in the investigation as indicating that there may be an election to fill an unexpired term of a commissioner so as to preserve that adjustment. In my judgment, it is not necessary that there should be a special ordinance providing for elections to fill vacancies. In that respect the charter is self-executing in effect. The election machinery is at hand and available. The power of the council to appoint sustains the tenure of the appointee only until the next general municipal election. The power of election then comes automatically into operation. The appointee has enjoyed all possible benefits of the exception to the rule which requires that officers shall be elected by vote of the people at large. To continue him longer in office would be to legislate judicially and impair the authority of the people to choose their own officers.

For these reasons, on the questions discussed at the hearing, I concur in the opinion of Mr. Justice HARRIS.

JOHNS, J. (Concurring Specially in the Opinion of Mr. Justice HARRIS).—It is the theory of our form of government that the people have the right to elect their own officials. While, for certain purposes and under certain conditions, the power to fill a vacancy in office is conferred by the people upon a designated officer or board, yet I do not believe that in the present instance the people who conferred that power ever intended that the appointment should be extended over and beyond the date of the next general municipal election after the vacancy was so filled. It was the purpose and intent of the people to reserve the right to fill any unexpired term of such vacancy at the first ensuing election. In the case of *State ex rel. Whitney* v. *Johns,* 3 Or. 533, the syllabus lays down the rule that:

"The appointee of the Governor, appointed to fill a vacancy in office occasioned by death or resignation, only holds said office until the first general election after the vacancy occurs. * * At that time the people may supply the office by election."

In the opinion it is said:

"The people of Oregon by their Constitution made their judiciary elective, and only gave the executive power to fill temporary vacancies, which should occur between elections. If the people had intended to part with this power by appointing county judges, they would have expressed it. It cannot be inferred. No inference or intendment is ever presumed against the sovereign. Such is the universal rule for the construction of statutes, for they emanate from the sovereign power which, in this state, is the people. They appoint the executive, and he only acts by delegated authority, and this authority cannot be pre-

sumed beyond the express words of the grant. And I think the power in this case only extends to the filling a vacancy until the next general election, when the people can regularly exercise their authority in electing officers. I think it is not reasonable to presume that, where the people have reserved to themselves the appointment of an officer, they would confer on the executive the filling of a vacancy in the office, which would extend the time of the appointee beyond a general election, and deprive the whole people of a county from electing their own local officer, when they could fill it as conveniently as they appointed the original incumbent.''

On this principle, I concur in the result of the opinion of Mr. Justice HARRIS.

Argued July 18, reversed and remanded September 17, 1918, rehearing denied January 14, 1919.

BEAKEY *v.* KNUTSON.

(174 Pac. 1149.)

Wills—Construction as a Whole.

1. A will must be construed as a whole, with effort to harmonize, if possible, the several clauses.

Wills—Construction—Intention of Testator.

2. Will must be construed to give effect to intention of testator.

Executors and Administrators—Power of Sale in Will—Individual Interest of Wife.

3. Where testator directed his "executrix" to sell his property, and in subsequent clause appointed his wife executrix, the wife had no power in her individual capacity to sell for her own use.

Wills—Construction—Words—"Requests"—"Desire."

4. In construing words such as "desire" and "request" when used in will, testator's intention is controlling, and, where the desire or request must be complied with to effect testator's purpose, they are to be regarded as words of command or direction.

Wills—Construction—Words—"Direct"—"Require."

5. The word "direct," as used by testator, is mandatory in meaning, is substantially synonymous with "require," and means to point

out with authority or direct as a superior, to order, to instruct, and to command.

[As to legal meaning of "require," see note in Ann. Cas. 1912A, 1234.]

Wills—Construction—Trusts—Education of Children.

6. Will giving all property to executrix, and in part reading, "I desire that my * * executrix shall sell such property as she shall deem proper, that she shall take care of, educate, maintain, and nourish our three children, * * for the purpose of so doing I direct and request that she use such or all of the money which may be the proceeds of any property she may sell as she may require for said purpose," *held* to create a trust for benefit of children.

Executors and Administrators—Power of Sale—Right to Mortgage Property.

7. Where testator in one clause gave executrix "authority to sell, dispose of, and use in any way she may deem proper," and in subsequent clause directed "that she use such or all of the money which may be the proceeds of any property she may sell" for purpose of educating and caring for children, the general words in first clause are governed by particular words of subsequent clause, and gave wife no power except to sell property for purpose of educating and caring for the children and gave no power to mortgage the property.

Wills—Construction—"Dispose of."

8. Authority to "dispose of" testator's property gives no right to mortgage such property, a mortgage conveying no title and effecting no final disposition of property.

Mortgages—Title.

9. A mortgage conveys no title, the title remaining in mortgagor.

Executors and Administrators—Sale of Property—Rights of Purchaser.

10. One who pays money on a legitimate transfer of property by an executor is not bound to see that it is rightfully applied.

Trusts—Sale of Trust Property—Rights of Purchaser.

11. One who pays money on a legitimate transfer of property by a trustee is not bound to see that it is rightfully applied.

Executors and Administrators—Unauthorized Sale—Duty of Purchaser.

12. One who pays money on transfer of property by executor that appears by the record to be unauthorized takes nothing, being bound to take notice of scope of power and manner of its execution as prescribed by will.

ON PETITION FOR REHEARING.

Wills—Bequest to Executor.

13. It is the rule rather than the exception that a bequest to an executor is deemed to be to him in his official capacity.

[As to devise or bequest to executor as provision for his compensation for services as such, see note in Ann. Cas. 1913D, 993.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1.

The plaintiffs, two of whom appear by guardian, are children of James W. Beakey, deceased. Before his death the latter made a will which, omitting the publication and attestation clauses, reads thus:

"First. I give, devise and bequeath all of my property of every kind and nature wheresoever situated to my executrix hereinafter named;

"Second. I direct that my executrix hereinafter named shall have full, complete and absolute authority to sell, dispose of and use in any way she may deem proper, all my said property or the proceeds thereof without any control or direction of any kind from any county or probate court;

"Third. I desire that my beloved wife, Mary Beakey, whom I hereafter name as my executrix, shall sell such property as she shall deem proper, that she shall take care of, educate, maintain and nourish our three children, namely: James William, Andrew Morgan, and Vincent Lawrence, for the purpose of so doing, I direct and request that she use such or all of the money which may be the proceeds of any property she may sell as she may require for said purpose; that out of the first sale of said property, she shall pay all my just debts and funeral expenses.

"Fourth. After all my children have been educated, and the youngest shall have arrived at the age of 21 years, I direct that she shall divide the property remaining in her hands and belonging to my estate in four equal parts, retaining one for herself and giving one part to each of our said children above named.

"Lastly. I hereby appoint my beloved wife, Mary Beakey, executrix of this, my last will and testament, to act without bonds, and without any direction or control of any county or probate court, and I hereby revoke all former wills by me made."

In substance, the complaint alleges that after the death of the testator his widow entered upon the discharge of her duties as executrix of his will under

appointment by the County Court of Multnomah County and, still later, married one George M. Harris. On September 26, 1913, Mrs. Harris and her then husband mortgaged certain realty belonging to the estate of the testator, to secure the payment of their promissory note in the sum of $5,000. Subsequently the mortgagee foreclosed the mortgage and issued execution on his decree for the purpose of selling the property for the satisfaction of the Harris note. At this juncture the plaintiffs, the sons of the testator, instituted this suit to restrain the mortgagee and the sheriff from selling the realty on execution, the object being to prevent a cloud upon the title. The Circuit Court sustained a general demurrer to the complaint and dismissed the bill, whereupon the plaintiffs appealed. REVERSED AND REMANDED.

For appellants there was a brief over the names of *Mr. Alfred P. Dobson, Messrs. Bauer & Greene, Mr. A. H. McCurtain* and *Mr. O. F. Montandon,* with an oral argument by *Mr. Dobson.*

For respondents there was a brief over the names of *Mr. Warren E. Thomas, Mr. Otto J. Kraemer* and *Mr. Lester W. Humphreys,* with oral arguments by *Mr. Thomas* and *Mr. Kraemer.*

BURNETT, J.—1, 2. The dispute is to be solved by a proper construction of the will in question. It is elementary that the whole instrument must be taken together and construed so as to effect the intention of the man who executed the writing, owned the property and had the power to dispose of it. We cannot adopt a process of dialysis, taking here a part and there a part of the document, and base our conclusions on any single clause. We must assume that by every-

thing he put into the writing the testator meant something and had a purpose for his utterances. If possible, the several clauses must be made to harmonize, and, above all, we must give effect to the intention of the testator as enunciated in the instrument under consideration.

3. Taking the instrument by its four corners, one of the most prominent features, indeed the one fairly paramount in its terms, is the purpose to educate, maintain and nourish the three children until the youngest shall have arrived at the age of majority. To effectuate this purpose the devise is made to an artificial and not to a natural person; the executrix is made the conduit by which the estate is to be applied to the objects delineated in the remaining parts of the will. It is plain that the wife, in her character as such, could not sell the property, even for the satisfaction of the debts of the estate. All disposition of its assets must be made by the executrix in her official capacity. As stated in *Pratt* v. *Douglas,* 38 N. J. Eq. 516, 534:

"There are no words in the will which authorize her to sell and dispose of the testator's property for her own use. On the contrary, the power of sale over his estate, real and personal, expressed in the will, is given to her as executrix, which implies a fiduciary disposition of the proceeds realized from the sales, inherent in the office, in virtue of which she was to exercise the power."

4. It is urged that the language of the will respecting what was to be done with the property amounts to mere precatory words. It is true that such words as "desire" and "request" are often held to have such signification. Even they, however, are controlled by the intention of the testator, so that as stated in *Wolbert* v. *Beard,* 128 Wis. 391 (107 N. W. 663):

"When words of recommendation, request or the like, contained in a will must necessarily be followed in order to carry out the clear purpose of the testator they are to be regarded as words of command or direction."

5. But we are not thus restricted in our efforts to discover the true meaning of the will before us. After expressing his desire that the executrix should sell the property, the testator says:

"I direct and request that she use such or all of the money which may be the proceeds of any property she may sell."

The term "direct" is mandatory in its signification. It means "to point out with authority or direct as a superior; to order; to instruct; to command": 14 Cyc. 291. The term is substantially synonymous with "require," which was construed to be mandatory in *Curd* v. *Field,* 103 Ky. 293 (45 S. W. 92).

It is plain that the only private or personal interest conferred upon the individual who was appointed to act as executrix is that described in the fourth clause of the will, requiring the division of the property into four parts when the youngest child shall have arrived at the age of 21 years. Then, and not until then, would the widow become entitled to anything in her own right. No one would contend that if the wife and mother had died before the testator, or had refused to qualify as executrix, and there had been appointed an administrator with the will annexed, the latter would have been authorized to sell or pledge the property or any part thereof for his own personal benefit. We conclude, therefore, that it is only in a fiduciary character and capacity that the executrix is to have anything to do with the estate.

6. It is stated in *McDuffie* v. *Montgomery,* 128 Fed. 105, 108, concerning a precatory trust:

"Tersely stated, that rule requires: (1) That the words used must be such that it shall appear from them that they were intended in an imperative sense. (2) The subject of the recommendation or wish must be certain. (3) The object thereof must be certain."

In the instant case, aside from the word "direct" as used in the will, the other terms are so plainly indicative of the testator's intent that it is clear they were used to express and enforce his determination concerning the disposition of his property, in a mandatory sense. The whole estate is the subject of the recommendation and the object to which it applies is clearly expressed, to wit: the maintenance and education of his offspring. Thus the rule as stated in the case from which the excerpt is quoted is plainly applicable in the present instance. We hold, therefore, that a trust for the benefit of the children and in a residuary sense in favor of the wife was marked out by the will: *Pratt* v. *Miller,* 23 Neb. 496 (37 N. W. 263).

7–9. It remains to be determined whether the transaction set forth in the complaint is a proper administration of her trust. The essence of her doing was that she and her second husband borrowed money for which they gave their individual promissory note. As an incident to that indebtedness they gave the mortgage upon the realty as if it were the property of at least one of them. Beyond controversy, the will did not give the executrix power to borrow money on the credit of the estate. The second clause, conferring upon the executrix "authority to sell, dispose of and use in any way she may deem proper all my said property" is framed in general words and is to be governed by the

particular words found in the third clause, where the testator says,

"I direct and request that she use such or all of the money which may be the proceeds of any property she may sell."

It is a maxim of construction that general words are controlled by particular words on the same subject, which principle is applicable to the instant case in the following manner: General power of disposition is given in the second clause, but when in the third clause he comes to particularize and "direct" and prescribe from what she must derive the money to carry out the main purpose of the will, the testator says it must come from the sale of the property. This excludes any right to mortgage the same. But, returning to the second clause, the meaning of the word "dispose" is settled by the case of *Trutch* v. *Bunnell,* 11 Or. 58 (4 Pac. 588, 50 Am. Rep. 456), where the court, speaking through Mr. Justice WALDO, says:

"The power, generally, to sell or dispose of the real and personal property of minors, whether conferred by a testator by will or upon a court by a public statute, confers no power to mortgage."

See, also, *Neilson* v. *Alberty,* 36 Okl. 490 (129 Pac. 847). In *Rutherford Land Co.* v. *Sanntrock,* 60 N. J. Eq. 471 (46 Atl. 648), the court stated:

"To 'dispose of' imports finality and only where a power to sell would include a power to mortgage would those words, unmodified or undefined, imply such a power."

It is elementary in this state that a mortgage conveys no title. It is not a finality of disposition of property. The title remains in the mortgagor. It is not included in the term "dispose of." The execu-

trix, therefore, is restricted in the administration of her trust, so far as the will is concerned, to a sale of the property, and that only for the purpose of nourishing, caring for, maintaining and educating the three children of the testator.

10–12. The complaint charges in substance that the money borrowed and secured by the mortgage was not used by either Mr. or Mrs. Harris for the purposes of the will, but that it was expended for their individual use and benefit. It is true that one who pays money on a legitimate transfer of property by an executor or trustee is not bound to see that it is rightly applied. On the other hand, he can take nothing by his participation in a transaction which appears by the record to be unauthorized. The scope of the power of the executrix and the manner of its exercise are prescribed by the will and anyone dealing with or for the assets of the estate is bound to take notice thereof, for the document is proved and of record.

Whatever the executrix might do under the terms of the will, she is not authorized to confederate with a new matrimonial consort and hypothecate the testator's estate for the benefit of herself and her new mate. The Circuit Court was wrong in sustaining a demurrer to the complaint, for it does state facts sufficient to constitute a cause of suit. The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BENSON, HARRIS and JOHNS, JJ., concur.

Denied January 14, 1919.

ON PETITION FOR REHEARING.

(177 Pac. 955.)

Petition for rehearing denied.

Department 1.

Messrs. Chamberlain, Thomas, Kraemer & Humphreys, for the petition.

Mr. Alfred P. Dobson, Messrs. Bauer & Greene, Mr. A. H. McCurtain and *Mr. O. F. Montandon, contra.*

McBRIDE, C. J.—The argument upon the petition for rehearing suggests in substance no matters not fully argued and considered at the hearing, but seems to proceed upon the theory that the conclusion arrived at in the opinion was that of the justice writing the opinion rather than that of the court. In this counsel are mistaken. The case was one of such importance that it received the careful attention of the whole court and after a careful consideration of the petition for rehearing and a re-examinaion of the authorities cited by counsel we still adhere to the opinion already rendered.

13. Clearly as language can express it clauses one and two of the will devise the property to decedent's wife as executrix, and in that capacity only. In these two clauses she is not mentioned as a wife and defendants' whole contention that the devise is to the wife personally, is based upon a construction of the first two clauses in connection with other clauses in the instrument, wherein she is designated as "my beloved wife, Mary Beakey, whom I shall hereafter name as

executrix" and other similar expressions of affection. It is the rule rather than the exception that a bequest to an executor is deemed to be to him in his official capacity: 2 Jarman on Wills, 1662, and cases cited in the original opinion. In every case the intent of the testator must govern and this intent, as stated in the original opinion, must be ascertained by a consideration of the whole will. The first two clauses of the will are couched in such language as a testator would use were he devising his property to an indifferent person to be used for the benefit of his family. The devise is not to his wife as such but to his executrix, and an intent to devise to her in other than her official capacity as executrix must be gathered, if at all, from other parts of the will. By clause 3 of the will the testator "desires that my beloved wife, Mary Beakey, whom I hereafter name as executrix, shall sell such property as she shall deem proper, and that she shall take care of, educate, maintain and nourish our three children," etc. Now, how does the testator propose that these children shall be maintained, educated and nourished? The will answers, "I direct." A command. "And request that she use such or all of the money." What money? Clearly that "which may be the proceeds of any property which she may sell for that purpose." Clearly for the purpose of educating and maintaining the children. Outside of the fact that he calls his executrix his "beloved wife" there is nothing here to indicate that he had any other primary purpose in mind except to provide for his children. Incidentally of course the executrix would perhaps be entitled to compensation out of the estate for the care and nourishment of the children, but we find nothing in the terms of the will to indicate that the devise was made

to her in any other capacity than as executrix and for the purposes mentioned in the will.

This view is reinforced by the fourth clause which directs that after all the children have been educated and the youngest shall have attained the age of 21 years, the estate remaining in the hands of Mrs. Beakey shall be divided equally between herself and the children. If it had been the intent of the testator to devise his property to his wife personally and absolutely by the preceding clauses of the will, the fourth clause would be equivalent to a direction to divide her own property between herself and her children, which would be an absurdity. The fourth clause is entirely consistent with the theory that the bequest was to Mrs. Beakey as executrix and in trust for the purposes of educating and maintaining the children, and with no other theory. It may be said the will is unjust to the widow but, perhaps unfortunately, the law does not avoid a will because it fails to square itself with what persons other than the testator deem to be justice. We have no means of knowing the intimate relations of the parties, the financial situation of the wife of the deceased, or any of the circumstances which may have influenced the testator; we only have the fact conceded by the demurrer that having remarried she and her new husband have borrowed $5,000 to use for their own purposes and for their individual use and benefit. In view of this attempted disposition of the property the will may have been a wise precaution instead of an injustice.

We are fully satisfied with the opinion heretofore rendered and adhere to it.

REVERSED AND REMANDED. REHEARING DENIED.

Argued at Pendleton October 30, affirmed December 24, 1918, rehearing denied January 21, 1919.

CARTANO *v.* CITY OF ATHENA.*

(176 Pac. 789.)

Municipal Corporations—Sidewalks—Constructive Notice.

1. Notice to a city of a dangerous condition of its sidewalks may be implied if the defect has existed for such a length of time that the municipal authorities, by the exercise of reasonable care, could have known of its existence and remedied it.

[As to liability of municipality for defect in street or highway as dependent on notice or knowledge when statute makes municipality liable for failure to repair, see note in Ann. Cas. 1913A, 691.]

Municipal Corporations—Defective Sidewalk—Notice—Jury Question.

2. In an action for injuries which plaintiff received as the result of a fall occasioned by a defect in the sidewalk, the question as to whether the city had constructive notice of the defect, *held*, under the evidence, for the jury.

Municipal Corporations—Sidewalks—Contributory Negligence.

3. Whether plaintiff, who was injured by a fall when he stepped into a hole in the sidewalk on a dark night, was negligent, *held*, under the evidence, for the jury.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc.

This is an action brought to recover damages for personal injuries. The complaint alleges that the defendant city built a wooden sidewalk in a specified locality within the corporate limits, which was one of the main and most traveled sidewalks in the city; that defendant carelessly and negligently failed to keep the sidewalk in a safe condition for travel, in that for a period of about three weeks, it allowed a hole three feet long and six inches wide to remain therein without taking any steps for the protection of pedestrians from injury resulting from such defect. It is further alleged that the city had built the walk, which was

*On constructive or implied notice of defect in sidewalk as condition of municipal liability in general, see note in 20 L. R. A. (N. S.) 705. REPORTER.

under its direct supervision and control, and that defendant knew or by exercise of reasonable care could have known that the defect in the sidewalk existed. It is also averred that on February 21, 1917, plaintiff, while walking on such sidewalk, in the night-time, was suddenly, without notice or warning, thrown violently to the ground by stepping in said hole, whereby he received the injuries of which he complains. There are a number of other allegations in the complaint, but we have set out sufficient for the purposes of this appeal.

Defendant's answer admits that it built and has maintained the walk, but denies the allegations of negligence, and that it had notice of the defect in the walk. It then pleads contributory negligence upon the part of the plaintiff, in that for a number of years he had been engaged in business on that street and had been living in the immediate vicinity of that portion of the street where the sidewalk was defective and where the accident occurred, and that at the time of the injury he knew that there was a hole in the walk at that point about three feet long, six inches wide and three inches deep, and had observed it almost daily for three weeks prior to the accident.

A reply consisting of denials was filed and a trial had to a jury, resulting in a verdict and judgment for plaintiff, and defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. Will M. Peterson, Messrs. Raley & Raley* and *Mr. Homer I. Watts,* with an oral argument by *Mr. Peterson.*

For respondent there was a brief over the names of *Mr. Coy Burnett, Messrs. Richards & Richards* and

Messrs. Carter & Smythe, with an oral argument by *Mr. Burnett.*

BENSON, J.—The assignments of error challenge the correctness of the ruling of the trial court in denying defendant's motion for a judgment of nonsuit. This motion, and the arguments of defendant's counsel contend that there is a total failure of proof that the defendant had notice of the defect in the sidewalk, and also that the court should have held, as a matter of law, that the plaintiff was guilty of contributory negligence.

1, 2. It is contended that the walk in question was located upon the principal throughfare of the city and within a block of the business center. Several witnesses testified to having observed the hole for periods varying from two to six weeks. W. P. Littlejohn testified that he was then a member of the municipal council and had been for about six years; that he walked along that street probably once a day; that he knew that "the walks were bad all along there."

The general rule in regard to constructive notice of defects of this sort is well expressed in 28 Cyc. 1390, as follows:

"Notice to a city of an unsafe and dangerous condition of its streets or sidewalks may be implied if the defect has existed for such a length of time that the municipal authorities, by the exercise of reasonable care and diligence, could have known of its existence and remedied it. There is no fixed or definite rule as to what length of time would be required in order to justify such inference of notice on the part of the municipality, but each case must depend upon the facts and peculiar circumstances attending it."

We think that under the evidence in the case at bar it was a question for the jury, and not one for the determination of the court.

3. Considering next the question of contributory negligence, it may be observed, that particular cases are of slight assistance to a court in determining whether or not a given state of facts constitutes negligence *per se*. The peculiar facts and circumstances of the individual case must supply the decisive factors. There was evidence to the effect that it was a very dark night. The witness Kidder says that hearing a groan, he went to where the plaintiff lay upon the ground, with his foot caught in the hole, and that he was unable, on account of the darkness to identify him until he heard his voice. Mr. Shick and his wife walking past them, stopped and were unable to identify either Cartano or Kidder, until they used a flash-light which Mrs. Shick was carrying. There had been a light fall of snow that day. The plaintiff says that it was so dark that he could not see the hole; that he knew that there was a hole in that vicinity, but that he also knew of two others, one of which was about six feet distant from the one causing the accident; that the latter extended from near the middle of the walk to the outer curb, while the former extended toward the inner side of the walk; that in his effort to avoid the first, he stepped into the second. That under evidence of this sort, the question of contributory negligence is properly submitted to the jury, seems to us to be beyond the pale of argument or the demand for authority, but it may be said that this view is emphasized in the following cases: *Russell* v. *Monroe,* 116 N. C. 720 (21 S. E. 550, 47 Am. St. Rep. 823); *Shook* v. *Cohoes,* 108 N. Y. 648 (15 N. E. 531); *Knoxville* v. *Cox,* 103 Tenn. 368 (53 S. W. 734); *Parcells* v. *Auburn,* 77 Hun, 137 (28 N. Y. Supp. 471); *Barton* v. *Springfield,* 110 Mass. 131.

We conclude that the motion for a judgment of nonsuit was properly denied, and the judgment is therefore affirmed. AFFIRMED. REHEARING DENIED.

BURNETT and HARRIS, JJ., not sitting.

Submitted on briefs October 28, 1918, reversed and remanded January 21, 1919.

ELDREDGE *v.* MILL DITCH CO.

(177 Pac. 939.)

Execution—Property Subject to Levy—Equitable Interests.

1. Intangible and uncertain interests which involve the rights of third parties, such as an equitable title in land where the legal title is not in the debtor, are not subject to execution.

Execution—Property Subject to Levy—Trusts.

2. Equity will not permit the levy of an execution upon a legal title held by a debtor as trustee for a third party, as in the case of an assignee for the benefit of creditors or an ordinary naked trust.

[As to equities which are not subject to levy under statutes subjecting trust estates to execution, see note in 97 **Am. Dec.** 304.]

Execution—Property Subject to Levy—Untransferable Interests.

3. Interests which cannot be transferred, such as franchises of corporations, rights to office, etc., are not subject to execution.

Execution—Property Subject to Levy—Public Interest.

4. Property which is so involved with the interest of the public that it cannot be levied upon and sold without interfering with the rights of the public, such as corporations like canals and railways, is not subject to execution.

Execution—Property Subject to Levy—Mutual Water Companies.

5. Property of a mutual water company, not organized for the purpose of selling water or as a profit corporation but for the sole purpose of transmitting and delivering to appropriators and owners of the water the quantity to which each is entitled, the relation of the corporation being that of a holding company, trustee or agent, is not subject to levy and sale under execution.

Waters and Watercourses—"General Corporation"—Ditch Companies.

6. A mutual ditch company, not organized for the purpose of selling water or as a profit corporation but for the sole purpose of transmitting and delivering to appropriators and owners of the water the

quantity to which each is entitled, is not a "general corporation," within the meaning of Section 6525, L. O. L.

Corporations—"Public Service Corporation"—Ditch Companies.

7. A mutual water company, organized for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled without profit, is not a "public service corporation," as that term is usually applied.

Carriers—Water Companies—"Common Carrier."

8. A mutual ditch company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of water the quantity to which each is entitled, is not a "common carrier" of water.

From Malheur. DALTON BIGGS, Judge.

In Banc.

This is a suit in equity brought to enjoin and finally to set aside the execution sale of the water rights and ditch property of the Mill Ditch Company, a mutual corporation for the distribution of water; to have a receiver appointed to take charge of such ditch and water rights, and levy the necessary assessments to pay off the debts of the corporation.

The defendant, Mill Ditch Company, is a corporation organized for the purpose of diverting water from the Malheur River and distributing it through the ditches in question to the stockholders in proportion to the shares of stock held by each stockholder. The shares of stock provided by the Articles of Incorporation are 4,750 of the value of $10 per share, and supposed to represent the full capacity of the ditch, one miner's inch for each share of stock.

The plaintiff is alleged to be a stockholder in such corporation owning four hundred shares of stock therein and entitled to such number of inches of water from said ditch, and has used the same upon his land for a number of years irrigating the same, and he alleges he has no other means for the irrigation of his land.

The defendant, United States National Bank, had at the beginning of this litigation, a judgment against the

Mill Ditch Company for the sum of $1,480 with interest, attorneys' fees, etc. It had levied its execution upon the entire property which, nominally at least, belonged to the Mill Ditch Company, including its entire water and ditch rights, and was about to sell the same under said execution at the time of the commencement of this suit, after which the property was actually sold under the execution for the sum of $1,784.79. The complaint was then amended showing the completed sale, and it is now sought to set aside the same. A demurrer to the complaint was sustained in the lower court, and the case comes here upon the demurrer and the allegations of the complaint alone.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. William E. Lees, Mr. William H. Brooke* and *Mr. P. J. Gallagher.*

For respondents there was a brief over the names of *Messrs. Davis & Kester.*

BENNETT, J.—It appears from the complaint that the defendant Hope is the owner of the majority of the stock of the Mill Ditch Company, and he is also a director of the defendant, United States National Bank. There were allegations in the complaint regarding the conduct on the part of Hope to the effect that he had intentionally permitted the assessments of the Mill Ditch Company upon the stockholders to lapse by reason of his majority control, and thus to permit the company to become insolvent, so far at least as the present payment of its indebtedness is concerned. The allegations of the complaint strongly suggest a collusion between Hope and the bank, but there is no direct allegation of such collusion, and we can find no direct allegation of any

improper conduct of the bank itself which might estop it from proceeding on its execution.

The case is presented, on behalf of both appellant and respondent, upon the sole question as to whether or not the water rights, ditches, etc., held by mutual water-serving company for the benefit of its stockholders, can be levied upon and sold to satisfy an execution against the corporation, and it will be considered upon that ground alone.

The question presented is a new and interesting one. Section 227, L. O. L., as amended, provides:

"All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him and not otherwise.

"Subd. 6. All property of the state or any county, incorporated city, town, or village therein, or of any other public or municipal corporation *of like character.*"

Just what is meant by "like character" and just how closely a public corporation must resemble a town or village, etc., in order to be within the provision, is not very clear. However it seems to be well settled both generally and in this state that there are some rights and interests, in the nature of property, which, on account of their inherent nature, cannot be effectually reached by an execution at law, and which, on account of their involved character, and of the complications with the rights of third parties, and with public interests, will be protected in a court of equity from an execution at law.

1. First: *Intangible and uncertain interests which involve the rights of third parties.* Such an interest is the equitable title in land where the legal title is not in the debtor but in some third person. It seems well settled that such equitable interest is not subject to execution: *Smith* v. *Ingles,* 2 Or. 43; *Bloomfield* v. *Humason,* 11 Or. 229 (4 Pac. 332); *Silver* v. *Lee,* 38 Or. 508 (63 Pac. 882); *Holmes* v. *Wolfard,* 47 Or. 93 (81 Pac. 819).

In the latter case it is said by Mr. Justice MOORE, delivering the opinion of the court:

"The rule thus established rests upon the assumption that an equitable interest in real property is an uncertain estate, which, if it could be sold on execution issued on a judgment rendered in a law action, would produce a sum grossly inadequate in proportion to its real value; for most persons, in purchasing real property, insist upon a certainty of the title thereto, and, where there is a doubt in this respect, usually decline to invest their money. If a compulsory sale of such interest upon execution were permissible, there would be little or no competition in bidding. Few people desire to purchase a lawsuit, and the judgment creditor would probably secure the equitable estate for a nominal sum."

2. On the other hand, we may safely assume that equity would not permit the levying of an execution upon a legal title held by a debtor as trustee for a third party, as in case of an assignee for the benefit of creditors, or of an ordinary naked trust. A court of equity would look to the interest of the real beneficiaries and would not permit them to be uselessly embarrassed by the sale of the legal title held by the debtor.

3. Second: *Interests which cannot be transferred.* Examples of this are the franchise of corporations, rights to an office, etc. Where, although the debtor may be such a corporation or, if an individual, may

have an interest in an office in the nature of property, yet because there is nobody who can take such interest, and they are not the subject of transfer from one to another, an execution would be utterly ineffectual.

4. Third: *Property, which is so involved with the interest of the public that it cannot be levied upon and sold without interfering with the rights of such public.* Such are the interests of corporations like canals and railways, even when in some sense held by private corporations, and the interests held by a school district and other public and *quasi*-public organizations.

The case of *Gue* v. *Tide Water Canal Co.* in the United States Supreme Court, 24 How. 257 (16 L. Ed. 635, 65 L. Ed. 635), is a leading case in relation to this class of property. In that case the judgment creditor of the canal company had caused an execution to be levied upon a house and lot and a wharf and canal locks belonging to the canal company in fee. It is said in the opinion:

"The Tide Water Canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna River usually passes, in order to reach tide water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it. * * The property seized by the marshal is, of itself, of scarcely any value apart from the franchise of taking toll, with which it connected in the hands of the company, and if sold under this *fieri facias* without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

"Now it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution * * The record and proceedings before us show that there were other creditors of the corporation to a large amount,

some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise, property which was essential to its useful existence."

5. It seems that all of these questions enter more or less into this case, and all are reasons why the property of this mutual water company held and used for the benefit of its stockholders alone and used for the purpose of transmitting and delivering water appropriated by them, and used upon their respective land; ought not to be permitted to be sold upon an execution against the water corporation.

It seems to be pretty well settled in the states having water codes similar to that of our own state, even in cases of public service corporations organized for profit and selling water to the general public, that the water and ditch rights really belong to the individual appropriator and is appurtenant to the lands upon which the same is used, and that the corporation transmitting the same is in the nature of a holding company or agent for the true owners of the water rights: Wiel on Water Rights (3 ed.), Vol. 2, § 1339, p. 1237, and authorities cited.

How much more so must this be true in the case of a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled. The relation here on the part of the corporation seems to be clearly that of a holding company, trustee, or agent for the real owners of the water who are putting it to a beneficial use upon their lands. It would seem clearly that the corporation in

such a case had no interest in the water or ditches which equity would permit it to sell and transfer to outside parties, and thereby deprive the water users of the same, and if this could not be done by private contract it certainly could not be done by an involuntary sale under execution.

The sale in question could work no useful purpose, but would practically destroy the entire property, and embarrass and hinder the owners of the water and perhaps prevent them from obtaining it, at all.

Having reached this conclusion upon this branch of the case it follows that the demurrer should have been overruled in the court below, and it is hardly necessary to consider how far a court of equity in a case of this kind, would interfere to protect the stockholders and other creditors (if there are any) from a wasteful sale, under the principles announced in *Holmes* v. *Wolfard, supra.* It is not to be overlooked, however, that this property which, presumably, cost the amount paid in for stock, $47,500, was sold on this execution for the amount of $1,784, about the exact amount of the judgment claimed, and was bought in even at that price by the creditors. In view of these facts the language of Mr. Justice MOORE in the Holmes case seems particularly pertinent, and it is questionable whether, if the shadowy rights of the corporation were of such a nature that they could be sold at all, it should not be in a court of equity, where the rights of all parties could be protected and the property made to bring some substantial portion of its value, as was suggested by the Supreme Court of the United States in the case of *Gue* v. *Tide Water Canal Co.*, 24 How. 257 (16 L. Ed. 635).

It is also unnecessary to decide how far this corporation and its pecuniary water rights and franchises were exempt from execution as a *quasi*-public corporation.

6–8. That it was not a "general" corporation within the meaning of the latter clause of Section 6525, L. O. L., is clear. It is also clear that it was not a "public service" corporation as that term is usually applied. It was not selling water to the general public at large and was not a common carrier of water. Nevertheless it has many elements of a *quasi*-public corporation. It is dealing with and transmitting property which belonged originally to the public and is of a public character: Section 6575, L. O. L. The legislature has sought to confer upon it the power of eminent domain (Section 6596, L. O. L.) and has declared its use of the water to be "a public and beneficial use and public necessity": *Pringle Falls Power Co.* v. *Patterson,* 65 Or. 474 (128 Pac. 820, 132 Pac. 527). It was distributing water to a portion of the public—to how large a portion does not appear in the complaint.

It seems that such a corporation might be fairly classed as a *quasi*-public one regardless of the fact that it was not a *general* company, and was not engaged in furnishing water to all comers. It was held by the court in *Rathfon* v. *Payette Irr. Dist.,* 76 Or. 610 (149 Pac. 1044), that "District improvement companies are also *quasi*-public corporations." There seem to be no essential differences, which would distinguish them in this regard, between improvement companies and mutual service companies like this one. They are organized under different laws but neither of them is *general* in its character and neither of them is a "public service" corporation. We are constantly broadening in our recognition of the public character of such corporations; and it seems difficult longer to distinguish between the corporations which serve identically the same purpose, because one deals with the whole public, and another deals with a definite group, including ten,

fifty or a hundred persons, all belonging to the same public. Even in the case of towns and villages and school districts, the primary purpose is for the benefit of its particular inhabitants.

In Cook on Corporations (7 ed.), Volume 4, Section 932, it is said:

"The tendency of modern times is to extend the power of government and to bring within the control of legislative action many kinds of business which formerly were considered strictly private. Such is the case with corporations operating a steamship line, or a wharf, a boom, etc. * * Irrigation companies have also during recent years become of very great importance and the subject of much litigation. A statute authorizing condemnation by an individual for irrigation or mining purposes may be constitutional in one state and not in another, depending upon the situation of the state and its possibilities for agricultural and mining industries."

Mr. Wiel, in his work on Water Rights (3 ed.), Volume 2, Section 1338, says, in relation to the rights of water companies under the Water Codes:

"It is closely approaching public ownership of irrigation systems."

And again,

"These things combined have shaped the law of Colorado, Wyoming, and the interior states in the direction that a right to natural resource (with a corresponding interest in the distributing system) belongs to the consumer, with a result fast approaching public ownership": Id.,§ 1339, p. 1237.

In this case it would be a calamity, to that portion of the public, represented by the water users under the ditch, if such ditch could be closed and their water rights destroyed and transferred, by such an execution sale; and the whole community would be more remotely affected, since they are dependent upon these (and

others like them) for the production of the necessities of life. May it not well be, that such water serving corporations, are as public in their purposes and as closely interwoven with the public interest as a small village or a school district on the one hand, or as the canal company considered in *Gue* v. *Tide Water Canal Co.*, 24 How. 257 (16 L. Ed. 635), already cited; and, therefore, not subject to execution against their property?

The judgment of the lower court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HARRIS, J., not sitting.

Motion to affirm allowed January 21, 1919.

VAN TASSELL *v.* JEFFERSON COUNTY.

(177 Pac. 955.)

Appeal and Error—Failure to File Abstract and Brief—Affirmance.

1. Where appellant has not filed his abstract or brief within the time required by Supreme Court Rules 6 and 8 (89 Or. 712, 713, 173 Pac. viii), and there has been no extension granted or any excuse offered for the failure, judgment will be affirmed on motion, as provided by Rule 16 (173 Pac. x).

From Jefferson: T. E. J. DUFFY, Judge.

In Banc.

On motion to affirm judgment. ALLOWED.

Mr. Vine W. Pearce and *Mr. Bert C. Boyles*, for the motion.

Mr. Lewis H. Irving, contra.

PER CURIAM.—1. This is a motion by defendants to affirm the judgment because of failure of plaintiff to

file his abstract and brief, as required by Rules 6 and 8 of this court.

Plaintiff filed his transcript on appeal on August 16, 1918. His time for filing an abstract expired September 5, 1918, and there has been no extension granted, nor is any excuse offered for failure to file the abstract and briefs as required by our rules.

Defendants move the court for an affirmance of the judgment, as provided in Rule 16, and it is so ordered, with costs against plaintiff. AFFIRMED ON MOTION.

Argued November 19, 1918, reversed January 21, 1919.

WISDOM *v.* ARNOLD.

(177 Pac. 958).

Pleading—General Issue—Matters Provable.

1. Under the general issue, evidence may be given of anything that would simply disprove the allegation controverted.

Logs and Logging—General Denial—Matters Provable.

2. In an action to foreclose a lien on logs for services, defendant could not, under a general denial, show that plaintiff had become a member in a partnership which previously had agreed to save defendant harmless from labor liens; a general denial giving plaintiff no notice of such a defense.

Logs and Logging—Foreclosure of Liens—Evidence—Sufficiency.

3. In an action to foreclose a lien on logs for services, evidence *held* not to sustain a finding that plaintiff had become a member in a partnership which had agreed to save defendant harmless from labor liens.

[By whom and for what labor or services logger's lien may be claimed, see note in **Ann. Cas.** 1916C, 198.]

From Douglas: JAMES W. HAMILTON, Judge.

Department 1.

At the times mentioned in the complaint, William Arnold and James Beasley, the defendants, were part-

ners and owners of a sawmill. J. M. Wisdom, the plaintiff, claims that he performed work and labor in getting out sawlogs and delivering them at that sawmill to be manufactured into lumber. He says he was employed by a firm of Tuttle & Wisdom, composed of C. H. Tuttle and Charles Wisdom, acting as agents for Arnold & Beasley in the matter of getting out the logs. He says in his complaint he performed the labor and services between April 12, 1916, and July 17th of the same year, for a period of 68 days, at the agreed and contract price of $3.50 per day, amounting in all to the sum of $238, which has not been paid in whole or in part. He alleges that on July 31, 1916, he filed in the office of the county clerk of Douglas County, wherein the labor was performed, a notice of lien upon the logs, which appears to be substantially in the form prescribed by the statute. He asserts he paid 80 cents for filing and recording the same, and that $50 is a reasonable attorneys' fee for instituting and prosecuting this suit for the foreclosure of the lien.

Arnold & Beasley alone answer, only denying each and every allegation of plaintiff's complaint. They allege no new matter whatever. The Circuit Court made findings of fact and conclusions at law dismissing the suit, and plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *Mr. John T. Long* and *Mr. George Jones,* with an oral argument by *Mr. Long.*

For respondents there was a brief and an oral argument by *Mr. Albert Abraham.*

BURNETT, J.—For convenience the plaintiff will be called Joe Wisdom, and his brother, member of the

firm of Tuttle & Wisdom, will be referred to as Charles Wisdom.

At the hearing, without objection, there was received in evidence a certain agreement between Arnold & Beasley, party of the first part, and Tuttle & Wisdom, a partnership consisting of C. H. Tuttle and Charles Wisdom, party of the second part, providing in substance that Tuttle & Wisdom should get out the logs in question and deliver them at the mill of the defendants, Arnold & Beasley. One of the provisions of the contract was that the party of the first part, Arnold & Beasley, should not be in any manner liable for any labor liens.

The plaintiff gave evidence in support of his claim showing the amount of labor he had performed, the agreed daily compensation therefor; that the same had not been paid, and that he had given due notice of his lien in the manner prescribed by statute. Under the general issue over the objection of the plaintiff to the effect that the same was incompetent, irrelevant and immaterial and not admissible under the pleadings, the defendant firm endeavored to prove that Joe Wisdom succeeded to the interest of Tuttle in the firm of Tuttle & Wisdom, and undertook as a new partner in that firm to perform the written contract already mentioned. In allowing this proceeding we are of the opinion the Circuit Court was in error.

1, 2. The object of the pleading is to give notice to the opposite party of the pleader's cause of action or ground of defense. It is true under the general issue, evidence may be given of anything that would simply disprove the allegation controverted. For instance, in the present case it would have been permissible to show that during the whole time mentioned in the complaint the plaintiff was sick in a hospital and unable to do

any work of the kind mentioned. But the attitude assumed by the defendants in the evidence is vastly different from such a situation. In effect they are saying:

"We confess you did the work you mentioned, but we had a contract with Tuttle & Wisdom saving us harmless from all liens, and you contracted with them to assume their obligations in that respect, and hence you cannot claim a lien against us because you have agreed to save us harmless in that respect."

The mere denials of plaintiff's complaint give him no notice whatsoever that the defendants would undertake to prove such a case, or attempt to show that he had assumed the obligation of another. It is not necessary at this juncture to cite further authorities than *Horn* v. *Davis,* 70 Or. 498 (142 Pac. 544), where the subject of what may be proven under the general issue is ably discussed by Mr. Justice RAMSEY.

Passing all this, however, we come to an analysis of the evidence on the subject. The testimony of the defendant Beasley is to the effect that after Tuttle had done but little work on the contract he left the neighborhood and was not thereafter known in the transaction, and that Charles Wisdom came to the witness and stated "he wanted a contract drawn up with him and Joe Wisdom, the same as the one they had, and said they would go ahead with the logging as partners." The witness stated that no contract was drawn up but that he agreed to the arrangement verbally. On cross-examination, however, he said there were present when this agreement was made only himself, Charles Wisdom, and the defendant Arnold; that they had no other agreement than the one with Charles Wisdom, and that they never had any understanding with Joe Wisdom about it. Further it appears in evidence that after that time all the orders that came to the defendant firm

for payments to the laborers, were signed by Charles Wisdom alone and honored as such. The testimony of the defendant Arnold is substantially the same as that of Beasley.

Jesse Williams, another witness for the defendants, testified that Joe Wisdom was running the donkey-engine used in the logging operations; that the witness himself was firing, and that on one occasion in a conversation with Joe Wisdom concerning his services, to use his own language:

"We talked about wages, something, but I don't remember just now. There was something said about wages, and I * * He said after they got these logs in that we were hauling then, that they were figuring on paying their fireman $3 a day, and if I thought I could stand the job, I could get that wages."

Witness further testified in answer to questions, as follows:

"Q. Now, he used the plural pronoun, 'we'?

"A. Well, I don't remember whether he did or not. I could not say for sure, but he was talking to me and to the best of my knowledge I think that is what he said, that they were figuring on paying me $3 a day.

"Q. What was the understanding there as to who was doing the logging business, as to who was doing the business, who was doing the logging?

"A. I supposed the Wisdom boys, I don't know. * *

"Q. What part did he [Joseph Wisdom] take in regard to running the business there, controlling the business?

"A. Well, I don't hardly know. He seemed to be running the donkey as far as I know, and helped in the woods.

"Q. Do you know of your own knowledge what their arrangement was as to being partners?

"A. No, sir.

"Q. Never heard that discussed between them?

"A. No, sir."

The witness further testified that the orders he had on the defendant firm for wages were signed by Charles Wisdom, and that he never heard the Wisdom boys say anything about a partnership.

Before the trial the defendants made an application for a continuance on account of the inability of the wife of defendant Beasley, and her mother, to attend as witnesses by reason of their sickness. In the affidavit it was stated that the two witnesses talked with Joe Wisdom in July, 1916, in which conversation he

"said to said Eva Beasley that the plaintiff and the said defendant, Charles Wisdom, were partners in the logging business described in plaintiff's complaint, as being the logging business of Charles Wisdom and C. H. Tuttle."

To avoid a continuance the plaintiff admitted

"that Eva Beasley and Marcella Bodwell will, if permitted to testify to the statements made in defendant's affidavit for continuance, testify as stated; but plaintiff does not admit the competency, materiality or truthfulness of said statements."

This led to a denial of the motion for postponement of the trial, and at the hearing the affidavit for a continuance was read in evidence. The defendant, Charles Wisdom, testified denying expressly that he made to either Arnold or Beasley any such statement as they imputed to him. He said he had no authority from Joe Wisdom to make such a statement, and that the matter of partnership between him and his brother had never been broached. Joe Wisdom testified in a similar strain, saying he never at any time entered into a partnership with Charles Wisdom and never authorized his brother to make such a declaration to Arnold & Beasley.

3. Considering the admission of both Arnold & Beasley that they never had any conversation or ar-

rangement with the plaintiff Joe Wisdom; that the testimony imputed to the absent witnesses related to a supposed oral admission of a party, which our statute says must be viewed with caution; that those witnesses were not subjected to cross-examination; that both the Wisdoms flatly denied any such arrangement; that the testimony of Williams shows he knew nothing about the matter, and above all, that under the general issue, the admission of testimony seeking to charge the plaintiff as a partner was not admissible, the weight of the testimony is in favor of the plaintiff.

The result is the decree of the Circuit Court is reversed, and one here entered foreclosing plaintiff's lien upon the logs and lumber mentioned for the sum of $238 principal, 80 cents recording fee, $50 reasonable attorneys' fee, and for the costs and disbursements of the suit. Whether the Circuit Court had jurisdiction of the firm of Tuttle & Wisdom does not appear from the abstract, hence on the record before us we can go no further than to decree a foreclosure of the lien against the logs and lumber, without personal judgment except for costs and disbursements against Beasley and the estate of Arnold, who the stipulation before us shows is dead, and his administrator substituted. REVERSED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued November 15, 1918, affirmed January 28, 1919.

BRITISH EMPIRE INS. CO. *v.* HASENMAYER.*

(178 Pac. 180.)

New Trial—Verdict—Nonconformity to Pleadings.

1. In action to recover $330 remaining unpaid on stock subscription, wherein defendant pleads fraud and demands judgment for $265 as damages sustained, a verdict for plaintiff for $1 was properly set aside by the trial court, being an impossible verdict under the pleadings.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2.

Action by the British Empire Insurance Company, a corporation, against Ernest Hasenmayer. Judgment for plaintiff for $1 set aside on plaintiff's motion and new trial granted. Defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Schmitt & Schmitt,* with an oral argument by *Mr. G. G. Schmitt.*

For respondent there was a brief submitted over the names of *Messrs. Carey & Kerr* and *Mr. C. A. Hart.*

HARRIS, J.—The plaintiff is a corporation organized and existing under the laws of the Province of British Columbia, Dominion of Canada. It is alleged in the complaint that on July 11, 1912, the plaintiff sold to the defendant ten shares of its capital stock for which the defendant agreed to pay $100 per share "upon calls to be made from time to time by plaintiff according to the laws, by-laws and regulations governing the same." It is further averred that on June 20, 1913, the defendant purchased an additional share of stock and agreed to pay $100 for it upon calls to be

*Authorities discussing the question of inadequacy of damages as grounds for setting aside a verdict are collated in notes 47 L. R. A. 33; 39 L. R. A. (N. S.) 487. REPORTER.

made from time to time. The complaint states that a call was issued for a payment of $10 per share to be made on or before April 16, 1914, with interest at 10% per annum from and after that date; that a second call for the payment of $10 per share was issued requiring payments to be made on or before February 15, 1915, with interest at the rate of 10% per annum from and after February 15, 1915; that a call was issued for a third payment of $10 per share to be made on or before May 1, 1915, and if not so paid then the amount called for was to bear interest at the rate of 10% per annum from May 1, 1915. The defendant refused to make any of the payments called for. The plaintiff prayed for a judgment for $330 with stipulated interest.

The answer avers that the ten shares were sold to the defendant upon the payment by him of $250 and

"with the definite understanding and agreement that the balance of said stock was to be paid by plaintiff corporation from accumulated dividends thereon, defendant agreeing to allow said dividends to be applied on the payment of the balance of said stock so purchased."

It is further alleged in the answer that an additional share of stock was sold to the defendant and that he paid $15 for it. The defendant says in his pleading that he was induced to purchase the eleven shares of stock in reliance upon fraudulent representations made by the plaintiff; that the stock "is worthless and of no value"; and he therefore demands judgment for $265, the amount paid by him on the stock. The affirmative defenses were denied by an appropriate reply.

1. In brief, the plaintiff claims that the defendant owes $330 with interest on eleven shares of stock which he purchased and agreed to pay for; the defendant contends that the contract is vitiated by fraud and that therefore he is not indebted to the plaintiff but that on

the contrary the plaintiff is indebted to him in the sum of $265. The verdict of the jury necessarily implies a finding that the price agreed to be paid for the stock was not completely paid. The answer is framed upon the theory that the defendant is entitled to repudiate the whole contract. The verdict of the jury cannot be squared with the rules of law applicable to the pleadings. Nor can the verdict be sustained even though the answer is treated as a ratification of the contract and as a demand for mere damages. It is impossible to sustain a verdict for $1 for the plaintiff, whether the answer is treated as a repudiation of the contract and a demand for moneys previously paid or whether the pleading is viewed as a ratification of a contract, tainted with fraud, and a demand for mere damages. It is impossible to view this controversy from any angle whatsoever and in the light of the pleadings and evidence make an award of $1 to the plaintiff and at the same time be loyal to the law which controls and governs the rights of the parties. In view of the pleadings and the judgment asked for by the plaintiff and the relief demanded by the defendant there was not and could not be any evidence to support the finding of the jury. The verdict was an impossible verdict. There was no evidence to support a verdict for awarding $1 to the plaintiff. The judgment appealed from is affirmed. AFFIRMED.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

Argued November 20, 1918, affirmed January 28, 1919.

ANDREW *v.* OREGON-WASH. R. & N. Co.*

(178 Pac. 181.)

Damages—Elements—Loss of Property—Evidence.

1. In action for injuries and loss of property by railroad's foreman of section gang, court properly refused to allow plaintiff to answer whether he made any profit out of boarding men on his outfit train, with which another train collided, his claim being for reasonable value of his lost goods.

Master and Servant—Loss of Property—Evidence.

2. In action for loss of property by railroad's foreman of section gang when his outfit train was run into by another, complaint being that railroad's negligence resulted in destruction or theft of plaintiff's property, court properly refused to allow plaintiff to show that after collision he demanded his property from railroad's claim agent.

Evidence—Loss of Property—Res Gestae.

3. In action against railroad by foreman of section gang who was injured and lost his property when his outfit train was run into by another, evidence that belongings of crew were gathered up, put into bundles, and checked to a point as baggage, etc., *held* properly submitted to jury as part of the *res gestae* on issue of the destruction of the property.

Master and Servant—Injuries—Pleading and Proof.

4. In action for injuries and loss of property by railroad's foreman of section gang in collision between his outfit train and a freight, as against general charges of negligence, railroad was entitled to show condition of brakes of freight and care it took to equip with such means of stopping.

Appeal and Error—Harmless Error—Evidence.

5. In action for injury and loss of property by railroad's foreman of section gang in collision between his outfit train and a freight, any error in admission of railroad's evidence that freight's air-brakes were tested *held* favorable to plaintiff.

Trial—Instructions—Repetition.

6. A requested instruction was properly refused in so far as it was covered by charge as given.

[As to propriety of requesting or giving numerous or lengthy instructions, see note in **Ann. Cas. 1918A, 1091.**]

Trial—Instructions—Support by Pleadings.

7. In action for injuries and loss of property by railroad's foreman of section gang in collision between his outfit train and a freight, portion of plaintiff's requested charge *held* inapplicable, and properly refused as not supported by any charge in complaint of negligence by failure to keep lookout on freight.

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*For a review of the authorities passing on the question of duties of master and servant with regard to rules promulgated for the safe conduct of a business, see notes in 43 **L. R. A.** 305 and 9 **L. R. A. (N. S.)** 972. REPORTER.

Trial—Instruction—Assumption of Issuable Fact.

8. In action for injuries and loss of money by railroad's foreman of section gang when his outfit train was struck by a freight, plaintiff's requested instruction *held* erroneous because assuming that goods for which he claimed damages were rightfully on train, a point challenged by answer.

Pleading—Trial—Conclusion of Law—Instruction.

9. Allegation, in complaint of railroad's foreman of section gang suing for personal injury and loss of goods in collision between his outfit train and a freight, that while outfit train was standing, railroad in violation of its rules failed to stop freight was a mere conclusion of law, not calling for instruction in respect to violation of rules.

Master and Servant—Injury to Servant—Pleading—Rules of Employment.

10. Where rules of employing company required a certain line of conduct, and injured servant's pleading shows a violation of such rules, their text may be shown in connection with conduct involved which is declared to be an infraction of them.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1.

The plaintiff avers in substance that on January 28, 1916, he was employed by the defendant railway company as an assistant foreman of an extra section gang No. 13; that while he was being carried on board of one of its construction trains from The Dalles to a point near Arlington, the train was stalled en route at Tumwater station and while thus at a standstill a freight train overtook it and collided with it, inflicting upon the plaintiff certain injuries, for which he claims damages. In addition thereto, for further cause of action he claims that he had on board the train certain personal property consisting of clothes, toilet articles, gold watch and chain, diamond ring, books, bedding, clock, etc., as well as $200 in money, besides sundry kitchen utensils, groceries and provisions, all of which he says were destroyed by the collision or stolen from the wreck.

As grounds of negligence which he imputes to the defendant, he alleges the following:

"1. In driving said freight train No. 24 into said outfit train No. 256 and causing it to collide therewith.

"2. In failing to observe reasonable care in the operation of train No. 24 to avoid said collision after the defendant by its trainmen became aware or should have become aware that the signals were against them.

"3. In failing to exercise a reasonable care in the operation of train No. 24 to avoid the said collision after the defendant by its trainmen on said train No. 24 had become aware of the presence of train No. 256 stalled in the same track on the defendant's main line as aforesaid.

"4. In failing to send a flagman back with stop signals soon enough or to a sufficient distance to insure full and every protection to train No. 256 after it became stalled under circumstances in which it might be overtaken by another train."

This matter he applies to all the causes of action and as to the loss of property he adds a fifth specification, as follows:

"5. In failing and neglecting at the time and place of said wreck, and in defiance of defendant's own rules and regulation to employ due or any vigilance in stationing watchmen, or making arrangements for the protection of said property on said train No. 256 against the looting and plundering of said wreckage."

The answer admits the plaintiff's employment and the fact of the collision, but otherwise denies the complaint. As to the claim for loss of property, the defendant avers as new matter substantially that the plaintiff had put his chattels on the train without any request from the defendant and without paying the lawful freight rate thereon, with intent to have them transported without liability for carriage on his part.

This new matter is denied by the reply. A jury trial resulted in a verdict and judgment for the defendant, and the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Mr. F. S. Senn* and *Mr. John R. Downes,* with an oral argument by *Mr. Senn.*

For respondent there was a brief over the names of *Mr. W. A. Robbins* and *Mr. A. C. Spencer,* with an oral argument by *Mr. Robbins.*

BURNETT, J.—1. It is assigned as error that the plaintiff having testified that he kept tobacco and things of that kind for sale to other employees, the court refused to allow him to answer whether he made any profit out of boarding the men. This ruling was correct, for the claim was for the reasonable value of the goods themselves and it would be immaterial to inquire whether he was making a profitable use of them or not. He claims nothing for loss of profits in any venture in which he employed his property.

2. Another claim of error was to the effect that the court refused to allow the plaintiff to show that from eighteen to twenty days after the collision he demanded his property from the claim agent of the company. The essence of the complaint is that the negligence of the company resulted in the destruction or theft of the property to the damage of the plaintiff. His demand made subsequently for the return of the property would neither enhance nor diminish his damages for the grievances described in his complaint.

3. It appears from the record substantially that the collision resulted in overturning some of the cars in the train upon which the plaintiff was riding; that the gang of workmen of which he was the assistant fore-

man and a member, gathered the belongings of the crew and put them into bundles; that the whole band of laborers, including the plaintiff, and their goods were taken back to The Dalles, where the packages together with some trunks, one of which corresponded in description to a trunk in which the plaintiff said his money was locked, were checked to Portland as baggage and the checks were delivered to the different members of the crew of laborers, including the plaintiff himself; that the stuff was taken to Portland and there surrendered to the holders of the checks as ordinary baggage. The remaining exceptions to the evidence relate to the details of this transaction. It is not pretended that this was conclusive upon the plaintiff, but it has value as part of the *res gestae* tending to show that as the crew was traveling together as one body of men, it, including the plaintiff, was treated as such by the company. Substantially all of their belongings were gathered together by the men themselves and they were all together, men and baggage, returned to Portland. This was entitled to go to the jury for what it was worth on the issue of the destruction of property.

4, 5. The plaintiff complains that the court was wrong in allowing the defendant to show that at The Dalles the apparatus for furnishing air to the brakes on the cars composing the freight train, was tested to see if it was in proper working order. The second and third charges of negligence are in very general terms, to the effect that the defendant failed to observe reasonable care in the operation of the freight train to avoid the collision. As against these charges, so general in their terms, the defendant was entitled to show the condition of its brakes and the care it took thus to equip itself with suitable means to stop the train. No harmful error can be predicated on the reception of this evidence. If it should appear that being thus provided,

its employees nevertheless failed to use the brakes, this testimony would only tend to heighten the defendant's negligence and would thus be advantageous to the plaintiff.

6, 7. Another assignment is the refusal of the court to instruct the jury as follows:

"It was the duty of the defendant railway company to exercise reasonable care in the operation of its trains; it was its duty to exercise reasonable care in dispatching its trains, so that they would not be operated so closely together as to endanger the lives of its employees. It was the duty of the engineers to keep a lookout and to ascertain whether the track was clear, and if the engineer knew or ought to have known by the exercise of ordinary care that there was a train ahead with which he was liable to collide, it was the duty of this engineer to keep back such a distance or to keep his train under such control so as to avoid a collision, and I instruct you that the fact that this collision occurred may be taken into consideration by you in arriving at your conclusion whether or not the defendant company was guilty of negligence. The fact that these trains collided and the circumstances causing the collision may be considered by you in arriving at your conclusion as to whether or not the company was negligent."

The court did instruct the jury in the charge as to the effect of the collision occurring between the two trains under the management of the defendant, substantially as the plaintiff requested. The remaining part of this request is inapplicable because it was not charged in the complaint as a ground of negligence that there was a failure to keep a lookout on the freight train.

8. In the tenth assignment of error, complaint is made of the failure of the court to instruct in the precise language of the plaintiff's request, about the personal injuries. But this ground, too, was covered by

the general charge of the court. In this assignment also is included the following language:

"I instruct you that he is also entitled to recover for the loss of any money which you may find he lost in this wreck, also for the value of his personal effects, such as clothing, trunks, and things of that kind. He is also entitled to recover for the loss of any kitchen utensils, groceries and provisions which he may have lost."

It would have been error to give this, because it assumes that the goods for which the plaintiff claims damages were rightfully on the train, but this is challenged by the answer and constitutes an issuable proposition. The court had no right to assume the truth of a traversed allegation. The eleventh assignment of error relates to the measure of damages, but was substantially covered by the general charge.

9. As a final ground of complaint against the proceeding below, the plaintiff says the court refused to give the following instruction:

"If you find that the engineers or conductors of the defendant company violated any of the rules of the company and that this violation was the proximate cause of the collision, then I instruct you that this violation of these rules may be considered by you as to whether or not the defendant company was negligent in the operation of these trains."

The only thing in the complaint alluding to rules is that the defendant, "whilst said outfit train was so standing, carelessly and negligently and in violation of its rules and regulations, failed to stop its freight train." To say that an act is in violation of its rules and regulations, without saying what those rules and regulations are, and stating the act itself, is to state a conclusion of law. It is not an allegation of fact. Hence there is no averment of negligence in respect to

the violation of rules calling for any such direction to the jury.

10. The cases of *Hecker* v. *Oregon R. & N. Co.*, 40 Or. 6, 12 (66 Pac. 270), and *Chadwick* v. *Oregon-Wash. R. & N. Co.*, 74 Or. 19, 28 (144 Pac. 1165), are cited in support of this contention. In the first of these cases the complaint showed that the defendant backed its train over a county road crossing at a high rate of speed, without ringing a bell or giving other alarm. In the Chadwick case the rules were pleaded by the defendant and the conduct of the plaintiff stated so that the court could determine whether the rule was broken. It is true, as stated in the Chadwick case, that where the rules of the company require a certain line of conduct, and the pleading shows a violation of those precepts, their text may be shown in connection with the conduct involved which is declared to be an infraction of them. To do so, however, there must be support for such a course in the pleading.

The contentions of the plaintiff, as stated by him in his complaint, were fairly presented to the jury, so far as we can discern from the record. In any event, we cannot say that there is no evidence to support the defense. Hence, there being no substantial error, there is no recourse but to affirm the judgment, leaving with the jury the responsibility for a wrong result, if there was one. AFFIRMED.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

Argued November 19, 1918, modified January 28, 1919.

BRYSON *v.* DAY.

(178 Pac. 184.)

Mortgages—"Consideration"—Prior Renewal of Another's Debt.

1. A past renewal of the debt of another is not the necessary "consideration," a benefit to the party promising or a loss or detriment to the party to whom the promise is made, for mortgage to secure such debt.

Mortgages—Consideration—Pleading and Evidence.

2. Evidence that defendant, in suit to foreclose mortgage to secure the prior debt of another, was practically the sole stockholder of such other, is not available to show consideration; the complaint not alleging such relation.

From Douglas: GEORGE F. SKIPWORTH, Judge.

Department 1.

This is a suit to foreclose a mortgage. The plaintiff sues as the trustee of the First National Bank of Roseburg, Oregon, and since the trial in the lower court, that bank has gone into the hands of a receiver, E. R. Bryson, who, in this court, has been substituted as plaintiff, by stipulation of the parties. The complaint alleges the execution of two promissory notes by the defendant Sarah I. Day, one dated February 13, 1911, for the sum of $761.05, and the other, dated May 29, 1911, for the sum of $876.50, and also a note executed by the Olalla Mining Company, for $4,370, bearing date, February 11, 1911. These allegations are followed by this averment:

"That to secure the payment of an indebtedness existing at that time in favor of said the First National Bank at Roseburg, Oregon, from said Olalla Mining Company, as evidenced by its promissory note in favor of said the First National Bank, and to secure, in addition to said indebtedness of said Olalla Mining Company, the payment of sundry loans evidenced by the promissory notes of the said Sarah I. Day, and of which

old indebtedness so secured the promissory notes hereinbefore described and sued upon merely evidence the balance still remaining due and unpaid, the said Sarah I. Day, in consideration of such credit by the said First National Bank to said Olalla Mining Company and in consideration of credit extended by said bank to her in person, as aforesaid, did on the 13th day of July, 1907, by an instrument in writing duly assign, transfer, set over, deliver and relinquish to said the First National Bank at Roseburg, Oregon, all her right, title and interest in and to that certain instrument in writing, commonly known as a sheriff's certificate of foreclosure sale, issued to the said Sarah I. Day on the 13th day of July, 1907, by the then sheriff of Douglas County, Oregon, in a foreclosure suit at that time pending in the Circuit Court of the State of Oregon for the county of Douglas, in which foreclosure suit the said Sarah I. Day was plaintiff and Shirley Mining Company, a corporation, was defendant, and that it was then mutually understood and agreed by all the parties to said assignment of such certificate of foreclosure sale that such assignment was intended for and to operate as a mortgage of the plaintiff's interest so acquired by said foreclosure suit in and to said certificate of sale and the real property therein described, to secure the payment of the indebtedness then existing, as aforesaid, in favor of the said the First National Bank of Roseburg from said Sarah I. Day and said Olalla Mining Company."

It is further alleged that no redemption from such sale was made, and thereafter the sheriff executed a deed to plaintiff of the property described in the sheriff's certificate of sale, in accordance with the terms of the assignment; that plaintiff holds the deed as a mortgage to secure the payment of the notes mentioned, and prays for a decree of foreclosure and a personal judgment against Sarah I. Day for the amount due upon her two notes, aggregating $1,637.55, and a like judgment against the Olalla Mining Company

upon its note, in the sum of $4,370. The prayer also asks for interest, attorneys' fees, etc.

The answer of defendant Sarah I. Day, after some admissions and denials, pleads affirmatively, that on February 24, 1906, the Olalla Mining Company executed its note to the First National Bank of Roseburg, in the sum of $3,000; that on that date the Olalla Mining Company was a creditor of the Shirley Mining Company, in the sum of $25,000, evidenced by five promissory notes of the face value of $5,000 each secured by a mortgage upon the real estate described in the complaint; that on February 24, 1906, the Olalla Mining Company assigned one of such notes to the First National Bank of Roseburg, as collateral security for the debt above mentioned; and for a valuable consideration assigned the other four notes to this defendant, who thereafter, for herself and the First National Bank of Roseburg, foreclosed the mortgage and became the purchaser at the execution sale therein, receiving the usual sheriff's certificate of sale therefor, which she subsequently assigned to the First National Bank for the purpose of securing her own indebtedness to the bank, and also assigned to such bank its proportional interest in the debt and property which were the subject of the foreclosure proceeding. It is further averred that the assignment of the certificate of sale was made on or about the 16th day of February, 1911, and that it was made

"without any consideration therefor except the indebtedness then owing by this defendant to said bank."

A reply having been filed, there was a trial resulting in a decree for plaintiff in accordance with the prayer of the complaint, and defendant Sarah I. Day appeals. MODIFIED.

For appellant Sarah I. Day there was a brief and an oral argument by *Mr. J. O. Watson.*

For respondent there was a brief and an oral argument by *Mr. Oliver P. Coshow.*

BENSON, J.—The questions submitted to us upon this appeal are: What is the legal effect of the assignment of the sheriff's certificate of sale, and, if the assignment upon its face purports to be an unlimited transfer as security for the payment of all of the notes mentioned in the complaint, was there any consideration for such transfer, other than the personal debts of the defendant?

In order to reach a clear conception of the problem which is presented, it becomes necessary to consider the evidence in the case. It appears therefrom, that on January 20, 1906, the Olalla Mining Company sold all of its assets to a similar corporation, the Shirley Mining Company, and, as a part of the purchase price, received five promissory notes of the purchasing corporation, each being for the principal sum of $5,000, and the entire indebtedness was secured by a mortgage upon the real property described in the complaint. On the next day, the Olalla Mining Company borrowed $3,000 from the bank, assigning to it as collateral, one of the five Shirley Mining Company notes, and on the same day assigned to defendant Sarah I. Day the other four of such notes in payment for moneys advanced by her in the operation of the company's mine. Thereafter Mrs. Day, with the knowledge and consent of the bank, began foreclosure proceedings which resulted in a decree in her favor for the entire indebtedness of $25,000, and a sale of the mortgaged premises, which sale was had on July 13, 1907, at which Mrs. Day became the purchaser and received a certificate of sale

from the sheriff. The note given by the Olalla Mining Company was not paid at maturity, but at various times thereafter it executed renewal notes therefor in which the matured interest became a part of the principal, the last of these being executed on February 11, 1911. On February 13, 1911, defendant Sarah I. Day, being indebted to the bank for certain overdrafts, executed the note for $761.05, mentioned in the complaint, and again on May 29, 1911, executed the other note for $876.50, for a like purpose. On December 16, 1910, the president of the bank wrote a letter to J. G. Day, who was the husband of Sarah I. Day, and was also general manager of the Olalla Mining Company, in which he requested Mr. Day, upon his next trip to Roseburg, to call at the bank and make some adjustment of the indebtedness of himself and others connected with him, that would be satisfactory to the bank examiner. Later Mr. Day had a conference with the president of the bank, and after returning to his home at Olalla, indorsed upon the sheriff's certificate of sale, and assignment in these words:

"I hereby assign my right and interest in this sheriff's certificate of sale on foreclosure to the First National Bank of Roseburg, Oregon. The consideration being a loan to the Ollala Mining Company on a promissory note, and sundry loans evidenced by my promissory notes. And the sheriff of Douglas County, Oregon, is hereby authorized to issue the deed to the realty herein described to said bank."

This assignment was signed by Sarah I. Day, and mailed to the bank. It bears the written date, "July 13, 1907," which was the date of the certificate. The only evidence as to the actual date of its execution is the testimony of J. G. Day, who says that he thinks it was done on February 15, 1911. When it is observed that on February 15th, Mrs. Day had only one personal

note at the bank, the second one not being executed until May 29th, it is possible that the assignment may have been made at an even later date. In any event, it was done at a later date than the execution of the mining company's renewal note, and there is no suggestion in the evidence of the later act being a consideration for the earlier. It further appears from the evidence that in 1910, the defendant corporation was dissolved by proclamation of the Governor, and that in the same year, but some months later, the following indorsement was made upon the note of the Shirley Mining Company, which had been deposited with the bank as collateral:

"This indorsement shows that this note is pledged to the holder hereof as security for money advanced on a note of the Olalla Mining Company and that the purchaser at the mortgage sale agrees that said purchase was made with the knowledge that said loan of said O. M. Co. was and is a first lien on the premises mortgaged, as shown by record related thereto. And it is agreed that said security against the mortgaged premises shall continue as if no proceeding in the same had been had.

"J. G. DAY,
"Treas. for O. M. Co.,
"For Sarah I. Day, Agent."

It also developed, in the cross-examination of J. G. Day, that at the time of the dissolution of the defendant corporation in 1910, Sarah I. Day was the owner of all but two or three shares of the corporate stock.

Upon this state of facts, the defendant Sarah I. Day, who is the only appellant, insists that the assignment of the certificate of sale means no more than a security for her personal obligations, and an acknowledgment that the Shirley Mining Company's note, held by the bank as collateral security for the defendant corporation's debt, is a portion of the debt secured by the mort-

gage, which had been foreclosed. She concedes that all of the real property in question is burdened with the obligation to pay her personal indebtedness, but that no more than one fifth of it is subject to the debt of the Olalla Mining Company. She also contends that the indorsement on the collateral note evidences nothing more than the fact that that note is protected by the mortgage security, only in the ratio which it bears to the total indebtedness thereby secured. She further contends, that if the assignment and the indorsement are to be construed as imposing any further liability than that, then to that extent, the assignment is void for want of consideration.

The plaintiff contends that the assignment is, in its terms, nothing less than an unlimited pledge of all of the real estate as security for all of the obligations mentioned in the complaint, and that the indorsement upon the collateral note is a clear corroboration of that interpretation.

So far as the indorsement upon the Shirley note is concerned, we can discern nothing in it further than an acknowledgment that that note is entitled to share with the other four in the mortgage security.

1, 2. The assignment, which is much more general in its terms, may be said to bear out plaintiff's contention, and this brings us to the question of consideration. Since the writing in question is a contract, it is elementary that there must be a consideration for the act of transferring the security. Consideration has been defined to be:

"A benefit to the party promising or a loss or detriment to the party to whom the promise is made": 9 Cyc. 308.

There is not a syllable in the pleadings in this case, outside of the assignment itself, disclosing any legal

obligation upon the part of Sarah I. Day, to pay the debt of the defendant corporation. The assignment was executed at a later date than the renewal note of the mining company, and if such renewal be urged as the consideration, that theory must fail because of the uniform holding of the authorities that a past consideration is insufficient to sustain such a contract: 9 Cyc. 319 and 358; 6 R. C. L. 672; *Kansas Mfg. Co.* v. *Gandy,* 11 Neb. 448 (9 N. W. 569, 38 Am. Rep. 370); *Conkling* v. *Levie,* 66 Neb. 132 (94 N. W. 987, 988); *Linton* v. *Cooper,* 53 Neb. 400 (73 N. W. 731). It is urged, however, that since Sarah I. Day was then the owner of nearly all of the corporate stock of the corporation, she is therefore liable for its debts, and that this relationship supplies the necessary consideration. It may be, although we do not decide, that under sufficient pleadings she might be so held, but it must be noted that in this case she is not charged by the complaint with being a stockholder, or as being associated therewith in any capacity, and therefore that subject is not an issue here.

We conclude, therefore, that the trial court erred in subjecting Mrs. Day's property to the payment of the Olalla Mining Company's debt. The decree will therefore be modified to the extent of subjecting no more than one fifth of the proceeds of the mortgaged premises to the satisfaction of plaintiff's judgment upon the note of the Olalla Mining Company. MODIFIED.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

Argued November 14, 1918, reversed and remanded January 28, 1919.

STATE *v.* BAILEY.

(178 Pac. 201.)

Robbery—Identity of Property—Sufficiency of Evidence.

1. In a prosecution for robbery, evidence *held* sufficient to prove existence and identity of note described in indictment as taken from prosecuting witness.

Criminal Law—Directing Verdict.

2. Discrepancies between witnesses called by state do not of themselves entitle a defendant to a directed verdict.

Robbery—Sufficiency of Evidence.

3. In a prosecution for robbery, evidence *held* sufficient to show that property was taken from prosecuting witness by force or intimidation and against his will.

Robbery—Evidence.

4. In robbery case, where defendant was charged with taking a note from prosecuting witness, defendant denying that there was any note, the state was entitled to show that the note described in the indictment was placed in the hands of a bank for collection.

Witnesses—Impeachment—Conviction of Crime.

5. The court properly sustained an objection to a question on cross-examination of prosecuting witness as to whether he had been indicted charged with the crime of murder, under Section 863, L. O. L., relating to impeachment; it not being contended that witness was convicted of a crime.

[As to impeachment of witnesses, see note in 14 **Am. St. Rep.** 157.]

Criminal Law—Harmless Error—Cross-examination.

6. Error in sustaining an objection to cross-examination was cured by subsequent answers of the witness giving the desired information.

Witnesses—Cross-examination.

7. Where prosecuting witness, in a robbery case, undertook to relate all that he did, as well as all that defendant did, defendant having held the witness a prisoner for more than a day, defendant was entitled to conduct a searching and exhausting cross-examination, concerning not only the prominent features, but also the minute details of the story.

Witnesses—Impeachment.

8. In view of Section 863, L. O. L., a witness could not be asked, "Now, from your experience with the boy during those six weeks that you were so closely associated with him, are you in a position to say whether or not the statements of that boy are reliable," to impeach the boy, who was nearly 15 years of age.

Criminal Law—Evidence—Other Crimes.

9. In robbery prosecution for taking a note, it was admissible to introduce evidence concerning the taking of a deed, where there was evidence in the record from which the state could argue to the jury that the accused conceived the single plan of securing possession of both the note and the deed, both having been taken in the course of a day and a half, in which time the prosecuting witness was held prisoner by the accused.

Criminal Law—Evidence—Other Crimes.

10. Evidence which is relevant to the issue is not made inadmissible merely because it tends to prove the commission of another crime.

Criminal Law—Opinion—Signatures.

11. A bank president, who had seen signatures on checks which had been charged against an accused, possessed the qualification, required by Section 787, L. O. L., to testify that a certain signature was that of the accused.

Criminal Law—Evidence—Res Inter Alios Acta—Check Stubs—Correspondence.

12. Correspondence and check stubs which an accused had never seen or known of were inadmissible in evidence against him.

Criminal Law—Evidence—Case in Chief.

13. In a prosecution for robbery, where defendant was charged with taking a note, it was competent to show as a part of the state's case in chief that accused had cashed a check at a bank; prosecuting witness having testified that the note taken was given to cover, among other things, a loan made by giving the defendant such a check.

From Deschutes: T. E. J. DUFFY, Judge.

Department 2.

Mrs. J. J. Bailey appealed from a conviction of robbery. The indictment charges that Mrs. J. J. Bailey did on February 26, 1917,

"feloniously take from the person of L. A. Rawlings, against his will and by force and violence, and by putting him, the said L. A. Rawlings in fear of bodily injury to his person, a certain promissory note in writing, described as follows, to wit:

"A promissory note for the sum of five hundred dollars bearing date, Bend, Oregon, December 11, 1916, due one day after date, payable to the order of L. A. Rawlings at the First National Bank of Bend,

Oregon, and signed by Mrs. J. J. Bailey, with indorsements thereon as follows: Secured by a lien on fourteen (14) cows and one blooded bull in the possession of Mr. Lawson, said note being on the form used and furnished by the First National Bank of Bend, Oregon, and being the property of said L. A. Rawlings."

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Ross Farnham* and *Mr. N. G. Wallace,* with an oral argument by *Mr. Farnham.*

For the State there was a brief and an oral argument by *Mr. H. H. De Armond,* District Attorney.

HARRIS, J.—Because of the questions presented by several of the 39 assignments of error, it will be appropriate to introduce the discussion with a statement of some of the conceded facts and also with a recital of a considerable portion of the evidence. The defendant and L. A. Rawlings are residing on neighboring homesteads located on the High Desert about 45 miles east of Bend. Rawlings entered upon his homestead in 1910 and Mrs. Bailey's husband entered upon the Bailey homestead probably in 1912. Rawlings lived alone; he called his place the Harney Holes Ranch. The Bailey home is about a mile and three quarters east of the Rawlings residence. There is evidence tending to show that Rawlings was a frequent visitor at the Bailey home. Mrs. Bailey's husband worked for a sheepman, and his employment kept him away from home most of the time, so that during the greater portion of the time Mrs. Bailey was alone with her son Oscar Whitney. Rawlings was between 65 and 72 years old; the defendant was

about 36 years of age; and Oscar Whitney's fourteenth birthday occurred on January 10, 1917.

According to the story told by Rawlings, "about the early part of the year" 1916 Mrs. Bailey told him "that when she got the money, she wanted my ranch." He testified that afterward, in the latter part of November, or the first part of December he was passing the Bailey ranch

"one day and she stopped me and showed me a forty-five hundred dollar check on a San Francisco Bank. * * She says you can make the deed out now for the ranch,—and I says, I told her,—there is no use being in a hurry, if you got the money to pay for it she is sold; but I says not until you have got the money. There is nothing doing."

Proceeding with his narrative, Rawlings told the jury that subsequently, on or about December 11, 1916, Mrs. Bailey represented to him that

"she was buying a bunch of cattle, and that they was in the possession of one Lawson living over on Crooked River, that they was fourteen (14) cows and one bull, and she said that there was a mortgage on them for five hundred dollars, and that she only had three days to raise the money to keep them from taking the property under the mortgage."

Rawlings also stated that Mrs. Bailey explained that in order to prevent a certain person with whom she had been litigating from getting "this money" she intended "to put the forty-five hundred dollar check in the First National Bank of Bend through Judge Ellis"; and that she said that if he would loan her $500

"she would pay it back when,—after that check got back,—when they told her that San Francisco check had been collected."

Rawlings claims that relying on what she said about the forty-five hundred dollar check he gave her a check for $500 on the First National Bank of Bend and that she gave him her promissory note for that amount; and that he wrote on the end of the note these words: "secured by a lien on fourteen cows and one blooded bull, all of which are now in the possession of one Mr. Lawson." There is evidence tending to show that on December 12, 1916, a check for $500 signed by L. A. Rawlings was presented to the First National Bank of Bend and that the bank honored it by paying $200 in cash and placing $300 to the credit of "Mr. or Mrs. J. J. Bailey." Rawlings asserted that the check which he gave to Mrs. Bailey was paid, because the bank returned it to him along with other paid and canceled checks.

Among the exhibits received in evidence is a deed marked Plaintiff's Exhibit "E." This instrument is dated December 19, 1916, is signed by Lee Alexander Rawlings and purports to convey the Harney Holes Ranch to Mrs. Bailey for the expressed consideration of $3,200. There is evidence tending to show that on the day when this deed was executed, or on the following day, Rawlings delivered the deed to Mrs. Bailey and that she gave him a check on the First National Bank of Bend for $3,870. Rawlings says that this check covered the following three items: $3,200, the purchase price of the Harney Holes Ranch, $170 the sum to be paid for "the horses, harness and other things" and $500, the amount of the note which had been given by Mrs. Bailey. Rawlings claims that he mailed the check to the bank and that the bank returned the check to him by the next mail "along just before Christmas" because it was

"no good." Rawlings says that he then "took the check back to her (Mrs. Bailey) and told her that she would have to fix it up." According to the evidence relied upon by the prosecution, Mrs. Bailey "said we would come down [to Bend] and fix up that returned check." Rawlings testified that

"we did set a date to go down and then she couldn't go down that day, or she said she couldn't go that day";

and that she afterwards returned the deed to him.

"After Mrs. Bailey had gotten back" the thirty-eight hundred and seventy dollar check, she told Rawlings, according to his testimony, that the forty-five hundred dollar check drawn on the San Francisco bank had been cashed and "that the money was in the bank"; and he says that subsequently on January 11, 1917, he sent the check by mail to the First National Bank of Bend for collection. Mrs. Bailey made a trip to Portland. Rawlings stated that upon her return from that trip "she asked me to send in and get the note; that she wanted to pay it off"; and that in compliance with her request he wrote to the bank on February 12, 1917, to return the note to him. The bank mailed the note to Rawlings and he "sent her word by one of the neighbors" that he "had the note"; and two or three days afterward, on Sunday, February 25th, Oscar Whitney came to Harney Holes Ranch and told Rawlings

"that his mother wanted me to come up and bring the note, and that she wanted to settle it."

Rawlings testified that on the following day, Monday, February 26, he rode over to the Bailey ranch for the purpose of collecting the five hundred dollar note. Rawlings entered the house upon Mrs. Bailey's in-

vitation and after he had been there a short time he started to leave and then, according to his testimony, Mrs. Bailey "grabbed" him and with the aid of the boy, Oscar Whitney, tied his hands and feet and sat him "down in a chair." To use the language of Rawlings,

"I was in a very bad state of health and I found out that I was very weak, and that they could handle me."

Rawlings says that he succeeded in disengaging his hands and that he cut the rope from his feet and in the words of the record,

"I got up and got to the door again, and it was fastened, or at least I couldn't get it open, and she came up behind me again, and then she bound me again."

This witness also told the jury that Mrs. Bailey attempted to force him to drink a drug which, according to the testimony of the boy, was laudanum. Rawlings claims that after he had been bound the second time and while his hands and feet were tied Mrs. Bailey took the five hundred dollar note and the canceled check for which the note had been given from his inside vest pocket and then "burned them up." He says, too, that after Mrs. Bailey burned the note and check "she was trying to gag" him and he "didn't want anything like that" and so he told her that he would not try to get away if she would untie him and if she would not gag him; and according to his story he was then released. The narrative recited in the record tells that Rawlings was in the Bailey house from the time of his arrival there at 10 o'clock Monday morning until about 8 o'clock Tuesday night when Mrs. Bailey, Rawlings and the boy saddled their horses and rode to Harney Holes

Ranch. If the testimony of Rawlings is to be believed he remained a prisoner in the custody of Mrs. Bailey even while riding home, for he says that before starting Mrs. Bailey fastened a rope to his horse's bridle and led the horse on which he was riding all the way to Harney Holes Ranch. When they arrived at Rawlings' house the door was unlocked, the lamp was lit, Rawlings built a fire and while Mrs. Bailey "stood guard" the boy searched the house and finally found and took from a trunk the patent to Harney Holes Ranch and also the deed which Mrs. Bailey had previously returned to Rawlings. Mrs. Bailey and the boy then returned to their home, taking the deed with them. She was arrested in March, 1917, and at that time delivered the deed to the officer.

Mrs. Bailey denied that she had exhibited a forty-five hundred dollar check to Rawlings, or that she had borrowed $500 from him, or that she gave him a note for $500, or that she had ever delivered to him a check for $3,870, or that she had bound or imprisoned Rawlings. She explained her possession of the deed by saying that Rawlings had given the instrument to her with the understanding that when her husband returned she and he were to execute and deliver a note for $1,000 to Rawlings in payment of the deed; and that she had refrained from recording the deed because she did not think she was entitled to do so until she and her husband first gave the note.

1, 2. The defendant insists that the court should have directed a verdict of not guilty for two reasons: First, because the prosecution failed to prove the existence and identity of the note described in the indictment; and second, because the state failed to prove sufficient facts to constitute the crime of rob-

bery. The first branch of this contention is really based upon the notion that where different witnesses give different and conflicting descriptions of an object seen by them, then their evidence, if believed, necessarily results in proving the existence of as many different objects as there are different and conflicting descriptions. L. A. Rawlings described the note in detail and his evidence alone was sufficient, if believed by the jury, to prove the existence and the identity of the note. He told the jury that Mrs. Bailey and Oscar Whitney came to his house about 9 o'clock on the morning of December 11, 1916; that the First National Bank of Bend had sent him three blank notes and that he used one of those blanks; that he filled in the blanks with a pencil and that Mrs. Bailey signed her name with the same pencil. In the printed brief it is said that:

"Rawlings was shown by the district attorney a blank form of note, yellow in color, used by the First National Bank of Bend, Oregon, and he testified that the note in question was on such a form."

Oscar Whitney testified that he not only saw the note on the day when it was executed but that he also saw and read the note "when we took it away from him"; that the paper was yellow in color; that Rawlings filled out the blanks with a little indelible pencil; that it was a First National Bank note; that the note was executed "along about 5 or 6 o'clock in the evening on Sunday, December the tenth"; that aside from the writing in the blank spaces and the signature at the bottom of the note there was no writing on the instrument except "that cattle business * *— it was just at the sign end of the note."

F. W. Merrill and his wife testified that in February, 1917, Rawlings showed them a note purporting to be signed by Mrs. Bailey. Their description of the note shown to them corresponded with the description given by Rawlings, except that Mr. Merrill thought that the paper was white and that it was "just a regular note form" and that he was "not so positive that it was on a bank form" and that the writing had been done with a pen and ink although "it may be that the entire note was written with pencil," and except that Mrs. Merrill thought that the paper was white and that the writing, including the signature, was in ink but that, she thought that the "indorsement" about the cattle had been written with a pencil.

C. S. Hudson, the president of the First National Bank of Bend, stated that, as he remembered it, the note which Rawlings sent to the bank for collection "was one of these notes that come in these little books" but that "it might have been" one of the blank notes from the bank.

There was evidence which, if believed, tended to show that each of the five witnesses saw the same alleged note. At all events the testimony of Rawlings was alone sufficient to carry the case to the jury.

Oscar Whitney's version of the actual taking of the note was different from that given by the prosecuting witness. The boy says that soon after Rawlings came into the house the latter asked his mother if she was "ready to settle for the note" and that she told "him to keep still about the note or she would do away with him." Oscar Whitney further testified that after Rawlings had been tied his mother asked Rawlings "if he had the note, and he said he

had it in the bank'' and that when Rawlings refused to write a letter directing the bank to return the note ''she went and got some laudanum and whiskey and brought it out there and said she was going to give it to him * * because he would not write''; that after she failed in her attempt to administer the laudanum and whiskey and Rawlings had again refused to write ''she said she was going to throw him in the well,'' but that he (the witness) persuaded his mother not to do it because ''there was twelve feet of snow in the well.'' The boy says that during the night and about 1 o'clock Tuesday morning his mother took the note away from Rawlings ''when he was scribbling on something over on the bed there.''

The account given by Rawlings and the story told by the boy of what occurred at Rawlings' house on the night of February 27, 1917, disagree in several particulars. The conflict between the testimony of Rawlings and that of Oscar Whitney as to the time and circumstances of the taking of the note and as to the particulars connected with the taking of the deed, and the conflict, if it can be said to be a conflict between any of the witnesses as to the color of the paper, or as to the kind of blank form used, or as to whether a pen or a pencil was used, were all circumstances which, though entitled to be considered in determining the credibility of the witnesses, were nevertheless not available in support of a motion for a directed verdict; for discrepancies between the witnesses called by a plaintiff do not of themselves entitle a defendant to a directed verdict: *Kaufman* v. *Bush,* 69 N. J. L. 645 (58 Atl. 291); *Wassermann* v. *Sloss,* 117 Cal. 425 (49 Pac. 566, 569, 59 Am. St. Rep. 209, 38 L. R. A. 176); *Bush* v. *Wood,* 8 Cal. App. 647

(97 Pac. 709, 710); *Archibald Est.* v. *Matteson,* 5 Cal. App. 441 (90 Pac. 723, 725).

3. The second branch of the contention that the defendant was entitled to a directed verdict is based upon the claim that there was insufficient evidence to show that the note "was feloniously taken from the prosecuting witness by force or intimidation and against his will." The testimony of Rawlings was, if believed, sufficient to establish all the elements of robbery; for according to his testimony the alleged note was taken from his person while his feet and hands were tied; and, while it is true that he said that he was "not very scary" and that he did not desire to use any more force than was necessary it is also true that in response to the question, "Were you then laboring under any fear whatever that you would receive or suffer violence and bodily harm at the hands of this defendant, Mrs. J. J. Bailey?" he gave this categorical answer: "I was." He testified, too, that she threatened to put him in the well and attempted to administer poison to him. Manifestly, there was evidence tending to show not only force and violence but also fear of force and violence: See 34 Cyc. 1803, and note. The crime of robbery is made out by proving that property was taken from the person by some one or more of the means enumerated in the statute: *State* v. *Lawrence,* 20 Or. 236, 239 (25 Pac. 638).

4. It was not error to permit the prosecution to ask Rawlings whether he placed the note in the hands of the bank for collection. The state was entitled to trace the note, if there was one, from the time of its execution until its destruction. This assignment of error is utterly without merit.

5. On cross-examination Rawlings was asked this question: "Were you ever indicted in the State of

Texas and charged with the crime of murder?" It is not contended that Rawlings was convicted of a crime. The court properly sustained the objection: Section 863, L. O. L.

The interrogatory embraced in assignment No. 8 was argumentative. The argument contained in this interrogatory might properly be suggested by counsel when addressing the jury. The court ruled correctly in sustaining an objection by the prosecution.

It was error to refuse to permit the defendant to ask Rawlings upon cross-examination whether there was "a lamplight" in the room during the night. However, the error was afterward cured by the answer of the witness found on page 137 of the Transcript of Testimony.

6, 7. Another assignment of error arises out of the refusal of the court to permit Rawlings to say on cross-examination whether during the time he was in the Bailey house he was where he "could see whether or not the others there had anything to eat." The defendant was entitled to an answer to this question. The error was subsequently cured by answers giving the desired information; but the necessity of a reversal prompts us to refer to the subject so that error may be avoided at the next trial. The prosecuting witness had told his story on direct examination about being kept a prisoner in the Bailey house from 10 o'clock Monday morning until about 8 o'clock Tuesday night and he had undertaken to relate all that he did as well as all that was done by Mrs. Bailey and the boy; and hence it is obvious that the defendant was entitled to conduct a searching and exhaustive cross-examination concerning not only the prominent features but also the minutest details of the story.

8. The court refused to permit the defendant to ask Oscar Whitney on cross-examination, this question:

"What was done in connection with Mr. Roberts bringing you in here for breaking into the house out there on the High Desert?"

Ivan Knotts testified that Oscar Whitney worked for him for about six weeks commencing with the middle of August, 1917. The defendant complains because the court refused to permit this witness to answer the following question:

"Now from your experience with the boy during those six weeks that you were so closely associated with him, Mr. Knotts, are you in a position to say now whether or not, whether or not the statements of that boy are reliable or not?"

The defendant argues that because of his age the boy could not have a general reputation "as he has had no dealings with business or social life of the community upon which to base a general reputation"; and that therefore "in order to impeach a boy of that age" it was competent to ask the quoted questions. The trial occurred in October, 1917. The witness was nearly 15 years of age at the time of the trial, his fourteenth birthday having occurred on January 10, 1917. Oscar Whitney was a competent witness under the statute. The statute points out how a witness may be impeached: Section 863, L. O. L. Neither one of the interrogatories complied with the statute; and hence there was no error in sustaining the objections of the prosecution.

9, 10. The defendant contends that the court erred in receiving the deed, Exhibit "E," in evidence; and also that it was prejudicial error to permit Rawlings and Oscar Whitney to tell about taking the deed from the trunk, on the theory that

"the only possible effect of the admission of this testimony and exhibit was to place before the jury matters tending to cause them to believe that the defendant was guilty of the commission of another unrelated crime at about the same time and thus prejudice their minds against the defendant."

The reader can better understand the question to be decided if attention is first called to some additional evidence found in the record. There was testimony from which the jury could infer that Rawlings had told Mrs. Bailey that the deed was in the bank at Bend, although the boy stated that she had been to Bend and upon making inquiry had been told at the bank that this deed was not there. Oscar Whitney testified that they "all got up about 5 o'clock," Tuesday morning, February, 27th, and "then she tried to make him, she tried to get him to write down for the deed"; that

"he didn't want to write for the deed in his own handwriting,—and he wouldn't write to suit her, and she would tear the note up and then she would get him to write it again, and he did it three or four different times, but he wrote different kinds of handwriting, and she didn't like it and she wouldn't use any of them."

There was evidence in the record from which the state could argue to the jury that Mrs. Bailey conceived the single plan of securing possession of both the note and the deed; and that this single plan was at first partially executed by taking the note and then consummated by taking the deed. Strictly speaking the taking of the deed was not an independent offense disconnected from and unrelated to the crime charged in the indictment. The taking of the note was the beginning while the taking of the deed was the ending of a single transaction. It was competent to tell the whole story to the jury and it was impossible to do

that without relating what took place at the Harney Holes Ranch as well as what occurred in the Bailey house: *State* v. *Von Klein,* 71 Or. 159, 165 (142 Pac. 549, Ann. Cas. 1916C, 1054). See, also: *State* v. *Roberts,* 15 Or. 187, 195 (13 Pac. 896); *State* v. *McDaniel,* 39 Or. 161, 173 (65 Pac. 520). It was competent to show that Rawlings was held a captive from Monday morning until left alone in his own house Tuesday night; and this part of the tale was not rendered incompetent by reason of the fact that the chapter about the deed is included in it and is a component part of it. Such evidence is received, not because it tends to prove another crime, but because it is relevant to the issues raised by the indictment and the plea of not guilty. Evidence which is relevant to the issue is not made inadmissible merely because it tends to prove the commission of another crime: *State* v. *Marshall,* 77 Vt. 262, 272 (59 Atl. 916); *People* v. *Rogers,* 192 N. Y. 331 (85 N. E. 135, 15 Ann. Cas. 177, 183); *Commonwealth* v. *Snell,* 189 Mass. 12 (75 N. E. 75, 3 L. R. A. (N. S.) 1019, 1032). No error was committed in receiving evidence concerning the deed.

11. After the prosecuting witness had told about sending the five hundred dollar note to the First National Bank of Bend, C. S. Hudson, the president of the bank, was called as a witness for the state and was permitted to testify that the bank received from Rawlings a note for $500 signed by Mrs. J. J. Bailey and that he believed that the signature was that of the defendant. It is contended that the witness was not qualified to speak of the genuineness of the signature. Section 787, L. O. L., reads as follows:

"The handwriting of a person may be shown, by anyone who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged,

and who has thus acquired a knowledge of his handwriting."

Hudson stated that the signature of Mrs. Bailey was on file "as one of our customers in our signature case"; that Mrs. Bailey had an account with the bank prior to the receipt of the note and that seventeen checks had been issued on that account; that if any of those checks were mailed to the bank he saw them because the mail came to him "first" and he opened the letters. If, as is usually done by a customer opening an account with a bank, Mrs. Bailey left a sample of her signature with the First National Bank of Bend, and if checks were drawn upon her account and paid by the bank and charged against her account without objection by her, and if Hudson saw the signature in the signature case and the checks or either of them and thus acquired a knowledge of Mrs. Bailey's handwriting, he unquestionably possessed the qualifications required by the statute.

12. Several assignments of error arise out of rulings of the court admitting letters which passed between the bank and Rawlings; and one assignment of error relates to a check stub received in evidence. When Rawlings sent the check for $3,870 to the bank he inclosed the check with a letter which he addressed to the bank. The letter reads as follows:

"Brothers, Ore., Dec. 21, 1916.

"First National Bank, Bend, Ore.

"Mr. Cashier: Find enclosed check $3870—Collect & cr to me

For Harney Holes Ranch.....$3200.
" loan on 14 cows..... 500.
" Horse, wagon & harness..... 170.

$3870.

"Kindly let me know of acceptance at once.

"Oblige, L. A. RAWLINGS."

When Rawlings sent the five hundred dollar note to the bank he mailed with it the following letter, dated January 11, 1917:

"First National Bank, Bend, Ore.

"Mr. Huson find Mrs. J. J. Bailey note for the $500—I loaned her to buy the Lawson cows. 14 & 1 bull. less $300—the ballanc of purchase price $800—I fixed note that way so she could get the $300 vallance from you, which her check book indicated she also owes me for horse, wagon & harness. She owes me the full face value of this note $500—I returned chk & got back *deed* I think she ment alright about giving chk you sent back. She will be down in a few days & said she would me all $670—you collect for me.

"L. A. RAWLINGS.

"over"

"Mrs. Bailey chk to Elsie Bailey on a san francisco Bank was the basis on which I done *bus*—with her. She says it is collected. May take ranch later."

On January 17, 1917, Rawlings again wrote to the bank, thus:

"Mr. Hudson I sent you Mrs. Bailey's note, for $500—did you get it? She said she would leave money at your bank. Did she do it? The note was of even date with the check I loaned to by the Lawson cows. note is secured by lien on cows. Please let me know.

note.....$500—
horse, wagon & harness 170—

$670—in all.

"let me know what she did about it; did you collect her san francisco check through Judge Ellis: for her."

The letter which Rawlings wrote on February 12, 1917, requesting the bank to return the note reads as follows:

"Mr. Hudson, that mysterious Mrs. Bailey wants to settle that note & acct. here. Please send if possible

me that her note by Saturday 17th mail to Brothers, Ore. and oblige.

"L. A. RAWLINGS.

"I am trying to get my money.

"Lots of trouble."

The bank addressed a letter to Rawlings on January 16, 1917, acknowledging "receipt of your letter of the 11th, inclosing note of Mrs. J. J. Bailey in your favor for $500."

Under date of January 24, 1917, the bank acknowledged receipt of Rawlings' letter of "Jan. 17th"; and on February 17th the bank wrote to Rawlings saying:

"We inclose note of Mrs. J. J. Bailey in your favor for $500."

Rawlings produced a check-book containing a stub in which was written the date "Dec. 11, 1916," and also the following:

"Pay to Mrs. J. J. Bailey—loaned on 14 cows & Bull—this check 500."

All this correspondence between the bank and Rawlings and the check stub were received in evidence over the objection of the defendant. There is not a word of evidence to show that Mrs. Bailey ever saw or even heard of any of these letters or the check stub until the time of the trial. The circumstances surrounding the letter mentioned in *State* v. *McDaniel,* 39 Or. 161 (65 Pac. 520), relied upon by the prosecution, are not in the remotest degree analogous to the situation here. If the record speaks the whole truth then it can be said that Mrs. Bailey was totally ignorant, until the time of the trial, not only of the contents of the letters and check stub but also of the fact of the existence of the papers. The introduction of the check stub and the correspondence between the bank and Rawlings can-

not on the facts appearing in the record be sustained by any established rule of evidence: 10 R. C. L. 1147; 16 Cyc. 945. It was prejudicial error to receive the letters and check stub in evidence.

13. The prosecution proceeded upon the theory that the testimony of Guy McReynolds was not competent as a part of the state's case in chief. This witness testified in substance that on December 12, 1916, as cashier of the First National Bank of Bend, he cashed a check for $500, charged the amount to the account of Rawlings, and that a portion was "deposited to Mrs. J. J. Bailey according to the records here." It was competent to show that Rawlings gave a check to Mrs. Bailey for $500; and that testimony was properly a part of the state's case in chief. It was competent to show what was done with the check and that Mrs. Bailey cashed it, if she did, and that testimony was just as much a part of the state's case in chief as was the evidence concerning the execution and delivery of the check. If upon a retrial the state offers any evidence concerning the cashing of the check it should be introduced as a part of the state's case in chief.

The judgment is reversed and the cause is remanded for a new trial. REVERSED AND REMANDED.

BEAN, BENSON and JOHNS, JJ., concur.

Submitted on briefs December 4, 1918, reversed and remanded January 28, 1919.

AYA *v.* MORSON.

(178 Pac. 207.)

Pleading—Amendment—Changing Cause of Action.

1. Amendment of complaint in action to enforce contract for transfer of liens *held* not open to objection of changing cause of action.

Contracts—Modification or New Contract.

2. A contract *held* not a modification of a contract by which plaintiff was to receive stock for services, but a new and independent contract, whereby the stock due plaintiff was to be delivered or exchanged for liens.

[As to effect of the seventeenth section of the statute of frauds on sales of corporation stock, see note in **Ann. Cas. 1917C, 991.**]

Evidence—Judicial Notice—Carey Act Liens.

3. The Carey Act liens being provided for by law and by executive act, judicial notice will be taken thereof under Section 729, subdivision 3, L. O. L.

Frauds, Statute of—Interest in Land—Carey Act Liens—"Real Property or Interest Therein."

4. Carey Act liens for reclaiming land are not real property or an interest therein, within Section 808, subdivision 6, L. O. L., requiring agreement for sale of such property or interest to be in writing.

Frauds, Statute of—Sale of Personalty—Barter.

5. A barter is within Section 808, subdivision 5, L. O. L., requiring, under certain conditions, agreement for sale of personalty to be in writing.

Trial—Offer of Proof—Sufficiency.

6. The allegation of the complaint and plaintiff's offer of proof that he did release, seeming to be of a present release at the time, he should have been allowed to make his proof, that it might be seen whether it actually took place, and was so accomplished as to take out of the statute of frauds an agreement for transfer of liens in consideration of release of agreement to deliver stock.

Frauds, Statute of — Performance — Sale of Personalty — Release of Obligation.

7. To take out of the statute of frauds an agreement for transfer of liens in consideration for release of agreement to deliver stock, the release must be effected by an unequivocal act.

From Multnomah: ROBERT TUCKER, Judge.

In Banc.

The questions presented in this case are in brief:

First, whether an agreement to transfer liens created under the Carey Reclamation Act, and generally known as "Carey Act Liens," is within subdivision 6 of section 808 of our Code, substantially re-enacting the statute of frauds and providing that an agreement "for the sale of real property, or of any interest therein," is void unless in writing.

Second, if such liens are not real property but personal in their nature, was the cancellation and release of an obligation to turn over certain shares in a canal company, which were then due to the intended assignee of the Carey Act Liens, sufficient part payment, to take the transaction out of subdivision 5 of Section 808, L. O. L., prohibiting "an agreement for the sale of personal property at a price not less than $50, unless the buyer accept and receive some part of such personal property, or pay at some time part of the purchase money," unless the sale is evidenced by writing.

It is alleged in the complaint in substance that the Des Chutes Land Company and its successor, Morson Land Company, were engaged in the reclamation of lands in Crook County, Oregon, under the Carey Act, and that the defendant Morson was the "principal stockholder, chief agent, manager, etc., of said corporation," and also of the Canal Construction Company, which seems to have been an organization subsidiary to the Des Chutes Land Company.

That the plaintiff Aya was employed by said Morson for a term of three years to assist said Morson in promoting said corporation, the Des Chutes Land Company, organizing the same, and selling its stock. For

these services it is alleged said Morson was to pay Aya the sum of $150 per year for each of the first two years, and $200 for the third year, and should assign to him "Carey Act Liens" on 160 acres of land, and should transfer to him 500 shares of the stock in the Canal Construction Company, supposed to represent 10 per cent of its capital stock.

Then follows paragraph 7 as it was in the original complaint, to wit:

"That after the contract between plaintiff and defendant had expired, said defendant Morson individually and as president and manager of the said the Des Chutes Land Company came to this plaintiff and informed this plaintiff that he wanted to get out a bond issue on a portion of the property of the Des Chutes Land Company, for the purpose of furnishing money for the Des Chutes Land Company; that said Morson stated at said time that in order to get out said bond issue it would be desirable and necessary to get rid of the contract between the Des Chutes Land Company and the Canal Construction Company. That at said time the said Morson had not delivered to plaintiff any of the stock in the Canal Construction Company, as provided in the contract attached hereto; that at said time plaintiff informed said defendant Morson that said stock had not been delivered, and that even though it were delivered a release of said contract as suggested by said Morson would make said stock practically worthless; that thereupon the defendants J. E. Morson and the Des Chutes Land Company promised and agreed, provided plaintiff would agree to the cancellation of said contract, that the Des Chutes Land Company would assign to the plaintiff $6,000 worth of liens on the West Side Tract of the said irrigation project, said liens being owned by the Des Chutes Land Company, which assignment was to be made within a reasonable time; that it was mutually agreed between the parties that the plaintiff would take the said liens and release his right under the

Canal Construction Company contract, provided said liens were given him from the property of the defendant located in Crook County, Oregon; that said defendants and each of them then and there agreed that upon the release of said contract said assignment of liens would be delivered to this plaintiff within a reasonable time, in satisfaction of his claim for stock in the Canal Construction Company. That plaintiff did thereupon release his interest in and to the Canal Construction Company, and agreed to the release and cancellation of the irrigation contract existing between the Canal Construction Company and the Des Chutes Land Company, the consideration therefor being the agreement of the Des Chutes Land Company and J. E. Morson to assign to this plaintiff liens on the West Side tract, as hereinbefore set out."

This paragraph seems to have been amended at the trial by leave of the court, to read as follows:

"That while the contract attached hereto and marked Exhibit 'A' was still in full force and effect, and after plaintiff had performed all the terms, covenants and conditions of said contract on his part to be performed, and after defendants J. E. Morson and the Des Chutes Land Company had complied with said contract in part, in that the Des Chutes Land Company and J. E. Morson had assigned to this plaintiff liens on 160 acres of land of the Des Chutes Land Company, and before the said defendants had delivered to this plaintiff the stock provided for in said contract in the Canal Construction Company, the defendant, J. E. Morson, came to this plaintiff and informed this plaintiff that he wanted to get out a bond issue on the property of the Des Chutes Land Company for the purpose of furnishing money for the Des Chutes Land Company; that said defendant Morson stated at said time that in order to get out said bond issue it would be desirable and necessary to get rid of the contract between the Des Chutes Land Company and the Canal Construction Company; that at said time the said Morson had not delivered to the plaintiff any

stock in the Canal Construction Company, to which the plaintiff was entitled as provided in the contract attached hereto. That at said time plaintiff informed said Morson that said stock had not been delivered and that a cancellation of said contract would make said stock in said the Canal Construction Company practically worthless, and that as a stockholder of the Canal Construction Company he would not agree to the cancellation of the said contract unless he received payment for his services in some other manner; that thereupon the defendant J. E. Morson stated to this plaintiff that in lieu of the stock in the Canal Construction Company, as provided in said contract, he, the said J. E. Morson, and the said the Des Chutes Land Company, would give to the plaintiff $6,000 worth of liens on the West Side Tract of said irrigation project, provided said plaintiff would release the defendant J. E. Morson from the obligation to deliver the stock in the Canal Construction Company, and provided said plaintiff would agree, as a stockholder of the Canal Construction Company, to the cancellation of the Canal Construction Company's contract. That said defendant J. E. Morson at said time stated that said liens were owned by the Des Chutes Land Company, that he would cause said corporation to assign said liens to the plaintiff within a reasonable time, and that said assignment should be accepted by this plaintiff in lieu of stock in the Canal Construction Company; that it was mutually agreed between the parties that plaintiff would accept said liens and release his interest as a stockholder in the Canal Construction Company and vote for a cancellation of the Canal Construction Company contract.

"That at said time said defendants, J. E. Morson and the Des Chutes Land Company, agreed to give the plaintiff liens upon the property of the defendant the Des Chutes Land Company in Crook County, Oregon; that said defendants then and there agreed, upon the release of said contract with the Canal Construction Company and the release of the obligation of J. E. Morson to deliver the stock in the Canal Construction

Company, that the said assignment of said liens would be delivered to the plaintiff within a reasonable time, in satisfaction of plaintiff's claim against the Canal Construction Company.

"That plaintiff did thereupon release his interest in and to the Canal Construction Company, and agreed to the release and cancellation of the irrigation contract then existing between the Canal Construction Company and the Des Chutes Land Company, the consideration therefor being the agreement of Morson and the Des Chutes Land Company to deliver to the plaintiff said six thousand dollars' worth of liens. That said agreement constituted a modification of that portion of said contract attached hereto and marked Exhibit 'A' which provides for the delivery of stock in the Canal Construction Company to this plaintiff."

1. It is urged on behalf of respondent that this amendment so far changed the cause of action that it was improperly allowed, but it is thought the amendment was clearly within the liberal rule declared by our statute and announced by many of the decisions in this state.

At the trial the plaintiff, being a witness in his own behalf, was asked:

"Q. Now, Mr. Aya, will you go ahead and tell the facts that led up to the agreement set forth in the complaint, and then state what was said by Mr. Morson and you.

"A. You mean this $6,000 agreement?

"Q. In February, 1914.

"Thereupon there was an objection to 'any testimony relating to this contract, to show its terms or to prove the contract itself, to prove any verbal contract between Mr. Morson and plaintiff herein upon the grounds that they have alleged that the consideration to be paid was liens upon land, and that that is an interest in land, and that the contract should be in writing.'

"Whereupon the court said, 'You are objecting to anything relating to the agreement?'

"A. Yes.

"The Court. Being oral?

"A. Yes.

"The Court. Well, as I understand the case, as it presents itself, your objection is based upon the ground that the statute of frauds obtains?

"A. Yes.

"The Court. Well, as I understand it, there is no contention here but what the contract was not in writing.

"A. (On behalf of plaintiff.) No, there is no question about that. The contract was not in writing. That is, this last contract of February, 1914, was not in writing.

"The Court. Yes. And that, furthermore, there is no controversy but what the subject matter of the contract was these liens, as provided for under the Carey Act?

"A. Yes.

"The Court. These liens of six thousand dollars in value?

"A. (On behalf of plaintiff.) There is no question about that.

"The Court. Under that situation, I think I will sustain the objection."

Thereupon Mr. Sheppard, attorney for plaintiff, made the following offer of proof, that the plaintiff, if permitted to testify, would testify as follows:

"That in lieu of the stock in the Canal Construction Company, which defendant Morson was to give him as compensation for his services performed under a contract attached to the complaint and introduced in evidence and marked Plaintiff's Exhibit 'A,' some six thousand dollars' worth of liens; that at the time the agreement was made Morson was the president, manager and principal stockholder of the Des Chutes Land Company and had authority to make such an

agreement; that in February of 1914 the defendant Morson, individually and as president of the Des Chutes Land Company, came to the plaintiff and informed the plaintiff that he desired to get out a bond issue on the property of the Des Chutes Land Company, that it was desirable and necessary that the contract of the Des Chutes Land Company with the Cana- Construction Company should be canceled; that at said time the plaintiff was entitled to 10 per cent of the stock of the Canal Construction Company under a contract which is attached to the complaint; that Morson wanted the plaintiff to release his interest as a stockholder in the Canal Construction Company and vote for the cancellation of the contract; that in order to induce Aya, the plaintiff, to vote for the cancellation of said contract and to release Morson from delivering 10 per cent of the stock in the Canal Construction Company to the plaintiff the defendant Morson, individually and as president and manager of the Des Chutes Land Company, promised and agreed to assign to the plaintiff six thousand dollars' worth of liens.

"The Court. That is, orally agreed?

"Mr. Sheppard. Yes; in full payment for the services performed by Aya under a contract known as Exhibit 'A'; that thereupon Aya agreed to release Morson from his obligation to deliver said stock in the Canal Construction Company and did release him, and did vote for the cancellation of the Canal Construction Company contract, thereby making the stock in the Canal Construction Company worthless; that Morson, when the liens were demanded of him, never denied but that he was to deliver and pay them to the plaintiff, never refused to deliver them until shortly before this lawsuit was brought; that Morson, at said time, agreed to assign the said liens from the West Side tract of his irrigation project in Crook County, and that said assignment was to be made within a reasonable time; that the plaintiff Aya has fully performed, in every particular, his part of the contract; that Morson has in part complied with the contract attached to plaintiff's complaint and marked Exhibit 'A' and in-

troduced in evidence, in that he has already assigned one hundred and sixty acres of liens, as provided in said contract, to the plaintiff; and that the plaintiff will further testify that said $6,000 worth of liens are worth the sum of $6,000."

Said offer was by the court rejected and exception was duly taken, whereupon the defendants moved for a nonsuit, which was granted, and plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief submitted over the name of *Mr. C. A. Sheppard.*

For respondents there was a brief submitted over the names of *Mr. A. C. Shaw* and *Mr. W. H. Fowler.*

BENNETT, J.—2. It is urged on behalf of appellant that the contract for the release of the canal stock and the assignment of the Carey Act Liens, while oral in itself, was only a modification of the previous original contract between Morson and the plaintiff, and as such modification was not within the statute of frauds, because the original contract was then fully executed, except as to the mere transfer of the canal stock by Morson in payment of plaintiff's services.

But it is thought that this latter transaction was in the nature of a new and independent contract, by which the canal stock due to the plaintiff was to be delivered or exchanged for the Carey Act Liens, and, therefore, it is not necessary to consider whether a written contract could be modified by a parol addition, which would itself independently be within the statute of frauds.

3, 4. Our Code in Section 808, L. O. L., re-enacts many of the provisions of the English statute of

frauds, but subdivision 6 does not seem to be as broad as the original statute and only restricts "the sale of real property or of any interest therein," whereas the English act provides:

"No action shall be brought upon any contract or sale of tenements or hereditaments, or any interest in, *or concerning them,* unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc.: Smith on Frauds and the Statute of Frauds, § 354, p. 451.

As a consequence, some verbal agreements in relation to lands might not come within our statutes which were within the original statutes of frauds: *Anderson* v. *Powers,* 59 Tex. 213. It is plain the contract to transfer these liens comes within Section 808, subdivision 6, L. O. L., if prohibited at all, for it is an "agreement" to transfer and *not* a transfer under Section 804, L. O. L.

The question then in this regard is, whether liens under the Carey Act are real property or an interest therein, and, therefore, required to be in writing by subdivision 6. The state of the record in the case leaves it open to some question as to just what was meant by Carey Act liens in the contracts in question. It is assumed, however, that they refer to the segregated liens provided for by the contract between the State of Oregon and the Des Chutes Land Company for lands being reclaimed under the Carey Act. These liens being provided for by law and by executive act, we take judicial knowledge of them under Section 729, subdivision 3, L. O. L. The contract between the Des Chutes Land Company and the State of Oregon, provides:

"The party of the second part hereby declares, fixes and establishes the sum of $36 per acre for each acre

of land embraced in this contract which may be reclaimed, as the amount due and payable to said party of the first part for the actual cost and necessary expenses of the reclamation of said lands, and now hereby *creates a lien* on and against said lands, which shall be valid *on and against the separate legal subdivisions,* of the land reclaimed from the date of reclamation until disposed of or released to settler, together with interest at 6 per cent per annum on the full amount of said lien from the date of reclamation until paid": See Report of Desert Land Board, 1911, p. 98, par. 10.

And the contract authorized by the state between the Des Chutes Land Company and the settlers, contains the following:

"The purchaser agrees for himself, his heirs, administrators, executors and assigns, to pay the sum of —— dollars, it being the amount of the lien due the company for reclamation as fixed by the said contract with the State of Oregon, with interest thereon at the rate of 6 per centum per annum from the date of reclamation. Payments for said amount are to be made as follows: Cash, as above stated, and the balance of —— dollars in —— equal payments, with interest thereon from the date of this contract, if executed on or after the date of reclamation, at 6 per centum per annum, payable annually at the office of the company, either in Portland or Crook County, Oregon, all of which deferred payments are for convenience only, evidenced by the purchaser's promissory notes of even date herewith, which shall bear interest from date, if given after date of reclamation, otherwise from date of reclamation, and said notes shall show on their face that they represent the unpaid balance on the payor's reclamation contract, dated —— day of ——, 19—."

There may have been some slight changes in these provisions at different times, but they have remained substantially the same.

It seems to be too well settled in this state to be any longer in question that mortgages and liens are not "real property, or any interest therein": *Anderson* v. *Baxter,* 4 Or. 105, 110; *Sellwood* v. *Gray,* 11 Or. 534, 537 (5 Pac. 196); *Watson* v. *Dundee M. & T. I. Co.,* 12 Or. 480 (8 Pac. 548); *Adair* v. *Adair,* 22 Or. 115, 131 (29 Pac. 193); *Kinney* v. *Smith,* 58 Or. 158 (113 Pac. 854); *Hillman* v. *Young,* 64 Or. 73, 82 (127 Pac. 793, 129 Pac. 124); *Casner* v. *Hoskins,* 64 Or. 254, 286 (128 Pac. 841, 130 Pac. 55); *Hughes* v. *Lansing,* 34 Or. 118, 124 (55 Pac. 95, 75 Am. St. Rep. 574).

In the case of *Anderson* v. *Baxter,* 4 Or. 105, 110, it is said:

"That a suit to foreclose a mortgage is not for the determination of any right or claim to, or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby. * * If it were a suit to divest a party of title, or to establish some right regarding the title to real property, it would stand upon a different footing."

So in *Sellwood* v. *Gray,* 11 Or. 534, 537 (5 Pac. 196), it is said:

"In this state a mortgage does not operate, as at common law, to vest in the mortgagee an estate upon condition. * * It is, in fact, what the parties intended, and as equity treated it, a mere security for the repayment of the debt or obligation, and serves simply to create a lien or encumbrance upon the property. * * The mortgage works no change of ownership in the property."

In *Casner* v. *Hoskins,* 64 Or. 254, 286 (128 Pac. 841, 130 Pac. 55), it is said by Mr. Justice MOORE:

"The rule is quite general that, a mortgage being only an incident of a debt, the validity of the security, so far as it may be affected by usury, is, in the absence

of any enactment to the contrary, governed by the principles of law applicable to personal contracts."

In *Hughes* v. *Lansing,* 34 Or. 118, 124 (55 Pac. 95, 75 Am. St. Rep. 574), a mechanic's lien was involved and the question was as to the waiver of the same. It was claimed, as is said by the court,

"That it is a transaction concerning real property in which the supposed agent, Baker, had no competent authority to bind Goodale under the statute of frauds."

And Chief Justice WOLVERTON, delivering the opinion of the court, said:

"As it concerns the second ground of objection, it is clear that the mere right or privilege of preserving and perpetuating a mechanic's lien upon buildings is not an interest in land."

So whatever may be the rule in other states it may be considered as settled in Oregon, that a mortgage or lien on land is a mere incident to the personal debt, and is not real property or interest therein, within the meaning of our statute of frauds.

5–7. But there is still left the question as to whether or not the agreement here presented to transfer these liens was void under subdivision 5 of this section, as an agreement for the sale of personal property greater than $50.

This transaction was a barter rather than a sale, being in the nature of a delivery of the right to the canal stock for the right to the lien. Nevertheless, barter has been generally held to be within such statutes: 20 Cyc. 239, subd. B, and authorities cited.

The only question, therefore, is whether or not the canceling of the agreement for the canal stock and the release of Morson from his agreement to deliver

the same, was a payment of the price or some part of the price of the liens.

At the time of this new transaction the plaintiff seems to have been clearly entitled to the transfer of 500 shares of the canal company's stock. The allegation of the complaint is,

"that plaintiff did thereupon *release his interest in and to* the Canal Construction Company; and agreed to the release and concellation of the irrigation contract then existing between the Canal Construction Company and the Des Chutes Land Company," etc.

The offer of proof is

"that thereupon Aya agreed to release Morson from his obligation to deliver said stock in the Canal Construction Company and *did release him* and did vote for the cancellation of the Canal Construction Company contract."

It does not appear how the release of Morson was accomplished but the allegation and offer of proof seems to be of a present release at that time, and it is thought that the plaintiff should have been permitted to make his proof upon that allegation, when it would have appeared whether the release and cancellation actually took place, as alleged, and whether it was accomplished in such a way as to take the agreement for the transfer of the liens out of the statute.

In *Milos* v. *Covacevich*, 40 Or. 239, 241 (66 Pac. 914), the agreement was to deliver a fishing net to the plaintiff in part payment of a balance due him for services, and the question was whether the agreement to accept the fishing net on the previous indebtedness took the transaction out of this subdivision of the statute, and it is said by Mr. Chief Justice BEAN:

"The mere oral agreement of the creditor that the goods shall go in settlement of the debt is not suffi-

cient to satisfy its requirement. Unless the contract is in writing, the statute requires something more than mere words, however carefully they may be considered. * * There must be acts which, in the nature of things, are less open to misconstruction and misunderstanding. If payment is relied on, it must be made in money or property, or in actual discharge, in whole or in part, of some antecedent debt. A mere agreement to apply the purchase money on the debt will not suffice, because the contract would still rest in words, and nothing more. There must be an actual cancellation and discharge of the indebtedness on the books of the creditor, or a written receipt executed by him, or some other like unequivocal act, not resting in mere words, which will bind him."

In this case we cannot say from the record before us, whether the release and cancellation of the canal stock in payment for the liens was effected by such unequivocal act as will bring the case out of the statute of frauds. That will no doubt appear definitely one way or the other in another trial of the cause.

The statute of frauds was adopted originally for a good and beneficial purpose. It seems to have stood the test of time for it has been re-enacted in some form in the Codes of almost every state in the Union. But it seems there is no law which human foresight can provide, however good in its general result, which does not sometimes work a hardship in particular instances and become a cover for wrong and unjust advantage.

It would not be right to presume in any case because a party takes advantage of the statute that he is attempting to perpetrate a fraud under cover of its shadow. It would not be right to say that the defendant is in that position in this case; nevertheless, there are some things in the record which suggest, as contended by the plaintiff, that this may possibly be so.

We have no choice but to declare the principles of law as they are established by the legislative enactments.

It is sometimes said, "that the statute will not be permitted to become a cover for fraud," but we know of no way of preventing it from sometimes having that effect, at least in a court of law, if one party is cunningly dishonest and the other improvident.

It is also urged that the contract for the transfer of the lien was void because a part of the consideration was the voting for the cancellation of the canal company's contract with the Des Chutes Land Company, and thereby the rendering of the canal company's stock worthless. And it is urged that where the director of a corporation receives a promise or an agreement in consideration, that he votes against the interest of the corporation the promise or contract to him is void.

But we cannot see that this question is in the record. We cannot find from the record that the plaintiff *was* a director of the corporation. There is such an allegation in the answer, but it is denied in the reply and we cannot assume that it is so in the absence of proof.

Besides, the doctrine invoked would only apply in the case of fraud, and here there might not be any fraud. The canal company's contract is alleged to have been canceled by vote of the stockholders, as well as the directors, and it may be that all of the stockholders consented to the transaction. All of these are questions which are not presented at this state of the case.

It follows the case should be reversed and remanded to the court below for a new trial.

REVERSED AND REMANDED.

Argued at Pendleton October 30, reversed and remanded December 24, 1918, sustained on petition for rehearing February 4, 1919.

BESSLER *v.* POWDER RIVER GOLD DREDGING CO.*

(176 Pac. 791.)

Judgment—Res Judicata—Identity of Issues—Adverse Possession.

1. Decree, in suit to quiet title, that suit be dismissed because plaintiff had neither established a valid contract of sale to his predecessors nor adverse possession for 10 years, *held* no bar to plaintiff's subsequent action for possession based on subsequently acquired title by adverse possession.

Pleading—Motion to Strike—Admission of Allegations.

2. Motion to strike paragraphs of plaintiff's reply admitted the truth of their allegations for purpose of determining whether the motion was properly granted.

Adverse Possession—Interruption—Adverse Decree.

3. Decree dismissing plaintiff's prior suit to quiet title and awarding no affirmative relief did not interrupt his possession of the land to prevent ripening of his title by adverse possession, to be enforced in a subsequent action.

ON PETITION FOR REHEARING.

Adverse Possession — Continuity of Possession — Recognition of Adverse Title.

4. If, at any time prior to expiration of the period of adverse possession, the one in possession recognizes the title which he seeks to defeat by his hostile holding, it operates to break the continuity which is one of the essentials of adverse possession.

Adverse Possession—Continuity of Possession—Judgment Awarding Possession.

5. Judgment, in action to quiet title, adjudicating possession of land and awarding it to one of the parties, is insufficient to interrupt running of statute; actual delivery of possession being necessary.

[As to requisites and necessity of continuity of possession, see note in 13 Am. Dec. 185.]

From Baker: GUSTAV ANDERSON, Judge.

In Banc.

On July 14, 1915, the plaintiff herein began a suit to quiet title to a small tract of land then used by him as the site of a slaughter-house, in connection with his

*For a discussion of the question of unbroken continuity as essential elements of adverse possession, see note in 15 L. R. A. (N. S.) 1202. REPORTER.

business in conducting a meat market. The defendant, herein was a defendant in that suit. The complaint was based upon allegations to the effect that in 1904, plaintiff's predecessors in interest had entered into a contract with the holders of the legal title, for the purchase of the land, the payments therefor to be made in monthly installments; that all of the installments had been fully paid, and that a deed had been demanded and refused. It was also alleged that plaintiff and his grantors had been in the actual, adverse possession of the premises for more than ten years prior to the commencement of the suit. The relief sought was a decree compelling a conveyance and quieting plaintiff's title.

The defendants, in that suit, answered denying the material allegations of the complaint, and alleging ownership in the defendant Derby. The prayer of this answer is not in the record, and we are unable to say whether or not the defendant asked for any affirmative relief, but the pleading otherwise concludes thus:

"That by reason of the facts above alleged, the court has no jurisdiction of this cause."

A trial being had, the court made and entered a decree in this language:

"At this time, the fifteenth day of January, 1916, the above-entitled cause comes on for hearing, plaintiff, appearing by his attorneys, John L. Rand and A. A. Smith, and defendant R. W. Derby appearing by his attorneys, Clifford & Correll, and defendants Hewitt Land Co. and Sumpter Lumber Co. appearing by their attorney, Leon W. Behrman; and the court having made and filed its findings of fact and conclusions of law, it is now, by virtue of the law and the findings aforesaid,

"CONSIDERED, ORDERED AND DECREED: That plaintiff takes nothing by his complaint, and that said suit be, and the same hereby is, dismissed. It is further

"CONSIDERED, ORDERED AND DECREED: That neither plaintiff nor defendant Sumpter Lumber Co. recovers costs or disbursements of the other; and that defendant, R. W. Derby have and recover of and from defendant Sumpter Lumber Co. his costs and disbursements herein, taxed and allowed at $——; and that defendant Hewitt Land Co. have and recover of and from defendant Sumpter Lumber Co. its costs and disbursements herein, taxed and allowed at $——, and that execution issue therefor."

Plaintiff appealed from this decree, which was subsequently affirmed by this court: *Bessler* v. *Derby,* 80 Or. 513 (157 Pac. 791).

Thereafter, on October 27, 1916, plaintiff began this action, wherein the complaint is in the usual form for the recovery of possession of real property, and describes the identical land which was in controversy in the equitable proceeding above referred to. To this complaint the defendant filed an answer which, *inter alia,* pleaded the proceedings and decree in the former suit, by way of estoppel. Plaintiff's reply thereto contains the following paragraphs:

"That in the trial of the said suit in equity the testimony developed the fact, and it was established as a fact from the testimony of the witnesses on behalf of the plaintiff and of the defendant in said suit, that the contract mentioned and described in plaintiff's complaint in said suit required the predecessors in interest and grantors of the plaintiff to make certain payments and that the last payment required to be made under said contract was to be made and was made in March, 1906; and under said proof the lower court found, and the Supreme Court of the State of Oregon affirmed the same, that the possession of plaintiff and his grantors and predecessors in interest of the said

premises did not become adverse or hostile to the defendants until March, 1906, and that the possession of the plaintiff and of his predecessors in interest and grantors up to March, 1906, was permissive, and that said suit having been commenced in July, 1915, the possession of the plaintiff of the said premises had not ripened into title at the time of the commencement of the suit, and that therefore the said suit, in so far as the question of adverse possession was concerned, had been prematurely brought, and that title to the property upon the ground of adverse possession had not been and could not have ripened in the plaintiff at the time the said suit was commenced.

"That after the commencement of said suit and during the continuation thereof and after the same had been fully determined upon the appeal the plaintiff still remained in the adverse, open, hostile, notorious and continuous possession of the said premises and the whole thereof until long after the full period of ten years from and after March, 1906, had expired, and plaintiff thereby became and still is the owner in fee of the said premises and the whole thereof, as alleged in plaintiff's complaint."

The defendant moved to strike these paragraphs from the reply upon the ground that they "are sham, frivolous, redundant, irrelevant and immaterial." This motion being allowed, plaintiff declined to plead further, and a judgment was entered dismissing the action, and plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. A. A. Smith* and *Mr. John L. Rand,* with an oral argument by *Mr. Smith.*

For respondent there was a brief over the name of *Messrs. Clifford & Correll,* with an oral argument by *Mr. Morton D. Clifford.*

BENSON, J.—1, 2. This appeal presents but one serious question for our consideration, and that is this: Does the decree in the suit constitute a bar to plaintiff's claim of ownership based upon adverse possession? We think not. The decree does not undertake to determine where the title lies, and gives no indication as to whether plaintiff failed to establish his ownership under the contract of purchase, or whether he failed to establish his adverse holding of the premises for a period of ten years. The opinion of this court, in *Bessler* v. *Derby,* 80 Or. 513 (157 Pac. 791), holds that plaintiff had failed to establish a valid contract for the purpose of the land, and in reference to his claim of adverse possession, says:

"It is true that the plaintiff alleges that his claim of title has been ripened by adverse possession; but, even though it be assumed that the possession has at any time been adverse, the testimony fails to show that such adverse possession has continued for the requisite period of time."

It seems clear, therefore, that upon a *de novo* trial in this court it was held that the plaintiff's suit should be dismissed because he had neither established a valid contract of sale, nor that he had held adverse possession of the land for a period of ten years. We are called upon, then, to say whether or not such a decree will bar a subsequent action for possession, based upon a subsequently acquired title by adverse possession. That the decree in the former suit is conclusive upon every issue that was then litigated or could have been determined at that time, is beyond controversy. But, accepting as true, as we must, for the purposes of this discussion, the allegations of plaintiff's reply which were stricken out, it is clear that they do not

call for the same evidence in their support as that which was submitted in the prior suit; indeed the evidence could not be the same, since it is now conceded that the former proceeding was prematurely commenced, and it is urged that what was then no title at all, has now matured into a right which plaintiff is justified in maintaining. It amounts, in effect, to the assertion of a title acquired after the rendition of the decree in the equitable proceeding relied upon by defendant. In *Barrows* v. *Kindred*, 4 Wall. 399 (18 L. Ed. 383), plaintiff brought an action of ejectment wherein he exhibited a chain of title consisting of a patent from the United States to Whitney, a deed from Whitney to Vose, the will of Vose, and a deed from his executors to plaintiff, dated March 18, 1861. The defendant gave in evidence the record of a judgment relating to the same premises, wherein Barrows was plaintiff and one Gordon was defendant, the judgment being in favor of Gordon. This prior suit was ended June 5, 1859. It appears from the record that the former action of ejectment had gone against plaintiff because Vose's executors, having the power to sell, had without authority of law, delegated that power to an attorney. Thereafter the executors themselves executed a sufficient conveyance to plaintiff, upon which he now relies. In the opinion, Mr. Justice SWAYNE says:

"Upon the trial of the case of *Barrows* v. *Gordon* the power of attorney from the executors and the deed executed by Kingsley were properly ruled out as void. They were not in the case. Barrows had no title to the premises in controversy, and judgment was given against him. This may be admitted to be conclusive as to his want of title at that time, and whether the decision of the court as to the power of attorney and the deed under it was erroneous or not, it would have

been a bar to another action attempted to be maintained upon the same state of facts. But this did not deprive Barrows of the right to acquire a new and distinct title; and, having done so, he has the same right to assert it, without prejudice from the former suit, which would have accompanied the title into the hands of a stranger."

The doctrine thus announced, finds support in many cases among which are, *Taylor* v. *M'Crackin,* 2 Blackf. (Ind.) 260; *Richey* v. *Bues,* 31 Utah, 262 (87 Pac. 903); *University* v. *Maultsby,* 55 N. C. 241; *Kenealy* v. *Glos,* 241 Ill. 15 (89 N. E. 289); *Woodbridge* v. *Banning,* 14 Ohio St. 328; *Quackenbush* v. *Ehle,* 5 Barb. (N. Y.) 469.

3. We conclude, therefore, that it was error to strike out plaintiff's reply, unless we determine that the suit in equity had the effect of interrupting the continuity of plaintiff's alleged adverse possession. Under the modern practice, the action of ejectment is not only employed to recover the possession of lands, but also, almost exclusively, for the trial of title to real property, and as a result, practically all of the adjudicated cases which bear upon the question now under consideration are of that class. In *Barrell* v. *Title Guarantee Co.,* 27 Or. 77 (39 Pac. 992), in a discussion of this subject, Mr. Justice WOLVERTON, speaking for the court, cites with approval *Mabary* v. *Dollarhide,* 98 Mo. 204 (11 S. W. 611, 14 Am. St. Rep. 639), quoting as follows:

"We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title."

This quotation is then followed by this statement:

"We have been cited to but one authority which holds that a mere judgment in ejectment will stop the running of the statute of limitations: *Brolaskey* v. *McClain*, 61 Pa. St. 166; so that upon authority we cannot say that the Tilton judgment alone is sufficient to break the continuity of the adverse possession of plaintiff."

The great weight of authority is to the effect that to produce such a result the judgment must be made effectual by the execution of a writ of possession: 1 R. C. L. 725; 2 C. J. 109. It is true that the prior proceeding in the present instance was a suit in equity, but since the modern action of ejectment is just as dignified a proceeding in determining the rights of property as a suit to quiet title, there is no good reason for differentiating the effects of the two. In fact, we find nothing in the authorities justifying such a conclusion. The most that is said in any of the text-books is, that if a decree requires the occupant to convey the land, it operates as a voluntary conveyance, and thereby destroys the continuity of the possession; or if the decree finds that he has no interest in the land, directs him to surrender possession and enjoins him from asserting any title, that it will stop the running of the statute: 2 C. J. 110; 1 R. C. L. 725. In the case at bar, it happens that the prior decree goes no further than to dismiss the suit. It awards no affirmative relief of any sort, and we cannot say that such a decree interrupted plaintiff's possession.

It follows that the judgment must be reversed, and the cause will be remanded for further proceedings not inconsistent herewith. REVERSED AND REMANDED.

HARRIS, J., not sitting.

Former opinion sustained February 4, 1919.

PETITION FOR REHEARING.

(178 Pac. 237.)

Messrs. Clifford & Correll, for the motion.

Mr. John L. Rand and *Mr. A. A. Smith, contra.*

In Banc.

BURNETT, J.—It will be recalled that the plaintiff began an action for the recovery of the possession of real property, stating that he is the owner in fee and entitled to the immediate possession of the tract, described by metes and bounds, and claimed damages for its detention. The defendant, without asserting any title in itself, denied the complaint as thus outlined. It further sets up the pleadings in which the plaintiff here sought to quiet his title as against the defendant and its grantee, wherein the defendants there defended and one of them in that suit asserted that he was then the owner in fee and in possession of the property, all of which affirmative matter alleged in the answer in that suit was denied by the reply there. The answer here shows the conclusion of that suit to have been that the plaintiff there take nothing by his complaint and that his suit be dismissed. After some denials, the plaintiff replied, as stated in the former opinion, to the effect that in the suit to quiet title it appeared that at that time the plaintiff had not been in adverse possession of the premises for a full 10-year period and that after the conclusion of that suit and the judgment therein plaintiff continued in adverse

possession, until taken altogether he and his predecessors in interest had been in possession for a full period of ten years, and hence that he was the owner in fee simple of the land. This new matter was stricken out. Assigning this as error, the plaintiff appealed and the judgment was reversed by an opinion of Mr. Justice BENSON.

4. The petition for rehearing urges upon us that the suit to quiet title constituted an interruption of the continuity of the adverse possession upon which the plaintiff counts as giving him the title in fee simple, under such cases as *Caufield* v. *Clark,* 17 Or. 473 (21 Pac. 443, 11 Am. St. Rep. 845), and others following it as a precedent. It is true that if, at any time prior to the expiration of the period of ten years of adverse possession, the one in possession shall recognize the title which he seeks to defeat by his hostile holding, it operates to break the continuity which is one of the essentials of adverse possession. The question presented is whether the suit to quiet title is such a recognition of, or, in other words, a *quasi* attornment to, the title which the one in adverse possession seeks to defeat. The present contention of the defendant is based almost entirely upon the following language of the late Mr. Justice MOORE in *Crow* v. *Abraham,* 86 Or. 99 (167 Pac. 590):

"In a note to the case of *Welner* v. *Stearns* (Utah), Ann. Cas. 1914C, 1175, 1182, it is said: 'If a claimant in the adverse possession of land brings an action involving the title thereto which is based on the existence of a right in another, it is such a recognition of that right as will arrest the running of the statute of limitations in favor of the occupant and against such right.' The alleged adverse right of Henry G. Crow having been thus arrested by the institution of his former suit, such claim could not be continued, but a

new right by adverse possession might have been inaugurated after the final determination of that suit. But however this may be, ten additional years not having elapsed from such decision until the commencement of this action no error was committed in this respect."

The former suit alluded to was that of *Crow* v. *Crow*, 70 Or. 534 (139 Pac. 854), in which Henry Crow sued his brother, E. J. Crow, alleging in substance that at a previous date the plaintiff Henry had conveyed his land to the defendant E. J. but had remained in possession of it all the time and that E. J. Crow only held it in trust for Henry, and the effort of his suit was to have the trust declared and to compel a reconveyance, the purposes of the trust having been accomplished. In *Crow* v. *Abraham* the widow and administratrix of E. J. Crow, who had died since the former suit, instituted an action against Abraham both as the executor of the will of Henry Crow and as an individual, to recover the rents, issues and profits of the lands there involved. Abraham defended as executor on the ground that his decedent had been in exclusive possession of the property for some twenty years and had conveyed an undivided interest to him as an individual, with a right to retain the rents, issues and profits in their entirety after a certain date. Mr. Justice MOORE held that a suit to declare a trust interrupted the adverse possession so that it could not be urged again in the action to recover from Abraham as executor, but that Abraham as an individual should be allowed to give evidence of the adverse possession respecting his individual share notwithstanding the effect of *Crow* v. *Crow* on the case of his decedent, because the individual was not included or bound by the former judgment. The earlier litigation, to which Mr.

Justice MOORE alluded, is different from this case. There, Henry Crow said to the court in substance:

"I conveyed a title to the defendant, E. J. Crow, which he still holds. Recognizing that title, however, I now contend that it was conveyed to him in trust for me and I pray that the trust be declared, and, it having been worked out to completion, that the defendant be compelled to return to me the property the title to which he obtained from me."

That was in effect a clear confession of a title resting in another party and coming within the language quoted by Mr. Justice MOORE from the note to *Welner* v. *Stearns,* in that it is "based on the existence of a right in another." Here the cases diverge in their circumstances. The plaintiff in this instance initiated an adverse possession. He claimed title to the land to be in himself as successor of former possessors, which he might under the doctrine of *Vance* v. *Wood,* 22 Or. 77 (29 Pac. 73), and later cases. As the phrase goes, he kept his flag flying until 1915, about nine years after the beginning of his adverse holding. Instead of recognizing title in the defendant or any of its grantees, he then brought the suit to quiet title in defense of his own estate. He did not acknowledge their title. He said in effect:

"These parties claim some interest in my land, but it is without validity and is utterly void. I demand that their baseless assertions of ownership be silenced."

In *Welner* v. *Stearns,* 40 Utah, 185 (120 Pac. 490, Ann. Cas. 1914C, 1175), the question was whether a suit to quiet title was the recognition of an adverse title. It seems that the plaintiff had come into possession of some realty which the county authorities had bid in at a tax sale, and had ultimately received

a deed for the same. The original owner was one Almanda Stearns and the defendants in the suit claimed under her. The court there, speaking by Mr. Justice FRICK, said:

"What was the legal effect of the pendency of the action that appellant commenced in November, 1903, to quiet the title to the lots in question in himself? Counsel for Borg (a defendant), strenuously insists that in commencing the action appellant arrested the running of the statute in his favor. There can be no doubt that if Almanda Stearns or her grantee had commenced an action against appellant in 1903, or at any other time before seven full years had elapsed from the time he took possession of the lots in question, under the circumstances stated, the running of the statute would have been arrested. By the bringing of an action to recover the property, the adverse claimant of the title, no doubt, would have effectively disputed the title or ownership of the one in possession, and thus the running of the statute would be arrested in favor of the one in possession. Is it not pertinent to ask, however: In what way was appellant's claim of ownership disputed or questioned when he commenced the action in November, 1903? Borg's counsel, at the hearing of this case, argued that, because appellant in his complaint to quiet the title to the lots had alleged that Almanda Stearns claimed some estate or right in or to the same, therefore he admitted her title. Counsel overlooks the important fact that by what appellant pleaded he did not admit that Almanda Stearns had any claim or interest in fact, but he merely alleged that she claimed to have an estate or right or interest in the lots. Appellant, however, immediately after making the foregoing statements, also alleged that her claim was baseless and without right. How can it successfully be claimed that in view of these allegations appellant conceded or admitted any outstanding title, estate, right or interest in anyone? If counsel's contentions are sound, then no claimant who commences an action to determine ad-

verse claims can state a cause of action under Section 3511, *supra* (being substantially like the Oregon statute for quieting title). It is certainly indisputable that in order to invoke the aid of the court appellant had to allege that someone claimed title or some interest or estate in the lots adverse to him. If there was no one asserting any title or interest adverse to appellant, why bring an action? It is clear that by what appellant alleged he did not admit or concede any estate or right in the former owner of the title, or in anyone else."

The situation before us, then, is that notwithstanding the decree of the Circuit Court, affirmed by this court, dismissing this plaintiff's suit to quiet title, he still remains in the actual possession of the estate, according to his narration, which clearly would be an adverse holding. He is saying in effect:

"Notwithstanding all your claims and all your decrees I am still here in possession and have been now for more than ten years, claiming openly, notoriously and exclusively a title adverse to you and to all others, whereby I have become the owner in fee simple of this land, based upon which I have brought ejectment against you."

It is difficult to conceive how the present defendants, defendants also in the suit to quiet title, could have ousted the plaintiff from the possession of the land by virtue of the decree dismissing his suit to quiet title. The effect of the decision there was simply to leave him where it found him.

The rule is thus stated in 2 C. J., page 109:

"According to the weight of authority, the mere recovery of a judgment in ejectment will not in itself stop the running of the statute of limitations. There must be an actual change of possession by virtue of such judgment, and where plaintiff in ejectment neglects to enforce his judgment within the period laid in

his demise, his right of entry under that judgment can only give a right to enter during the continuance of the demise laid in the declaration for which the judgment was rendered, and after the demise has expired the right to enter upon the land in virtue of the judgment no longer exists."

5. The former decree did not undertake to do anything about the possession. It did not in terms give the possession to one or the other. The case, therefore, is not so strong as where the judgment has been rendered directly adjudicating the possession of the land and awarding it to one or the other. Yet in that case, as the text cited shows, there must be an actual delivery of possession and not a mere judgment for the same, to interrupt the running of the statute.

We adhere to the former opinion.

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4. In action for trespass by sheep, evidence *held* to show that defendant was the owner thereof. (Jones Land & Livestock Co. v. Seawell, 236.)

Animals—Cruelty to Animals—Variance.

5. Where indictment framed under Section 2103, L. O. L., alleged cruelty, and further, that horse was unfit for riding, but failed to allege that defendant was owner as required under the second part of such section, and evidence showed defendant to be the owner and that he rode the animal while it had an ulcerated sore on its back, there was no variance; the two parts of the section not being in conflict. (State v. Goodall, 485.)

Animals—Cruelty to Animals—"Torturing and Tormenting Animals."

6. The acts of riding a horse suffering with an ulcerated sore on its back and shoulders which fell under the saddle blanket, and of depriving the animal of necessary sustenance, constitute the crime of "torturing and tormenting" within Section 2103, L. O. L. (State v. Goodall, 485.)

APPEAL AND ERROR.

Appeal and Error—Harmless Error—Conflicting Instructions.

1. Conflicting instructions are ground for reversal, because tending to confuse the jury. (McCabe v. Kelleher, 45.)

Appeal and Error—Disposition—Rendition of Judgment.

2. Where judgment of nonsuit is reversed, notwithstanding it appears on the face of the record that plaintiff is entitled to recover a specific amount, the case will be remanded for new trial where under the issues defendant might tender evidence to contradict the *prima facie* case. (Wallace v. Oregon Engineering Co., 31.)

Appeal and Error — Presumption Favoring Court Below — Denial of Motion to Dismiss Appeal from Justice.

3. Where original papers are attached to transcript of record on appeal from Justice Court, and there is sufficient certificate of justice that transcript contains all docket entries and all original papers attached, the Supreme Court must presume that the action of the trial court in denying motion to dismiss the appeal from the justice was regular in the absence of affirmative showing to the contrary. (St. Helens Lumber Co. v. Evans, 71.)

Appeal and Error—Making up Record—Attachment of Papers After Appeal.

4. It is within discretion of trial court, after appeal has once been taken, to cause papers omitted from record to be attached thereto, and in absence of affirmative showing to contrary it will be presumed that court acted regularly and within his powers. (St. Helens Lumber Co. v. Evans, 71.)

Appeal and Error—Deposit in Court to Avoid Forced Sale—Assignment of Deposit.

5. Plaintiff cannot appeal from a decree declaring a lien on land in his favor, and permitting appellee to deposit with clerk of lower court money awarded so as to avoid forced sale of appellee's land if he assigns his interest in deposit to the surety on his appeal bond as indemnity, since he has no right to money deposited until he accepts it. (Hodgson v. Curtin, Executor, 105.)

Appeal and Error—Bonds—Defect—Correction.

6. Under Section 505, subdivision 4, L. O. L., when party gives required notice of appeal and through mistake omits to file a proper undertaking therefor, permission may be granted to supply defect, and appeal will be dismissed unless that is done. (Hodgson v. Curtin, Executor, 105.)

Appeal and Error—Review—Error Favorable to Appellant.

7. Defendant in a suit for trespass cannot assign as error a reduction of recovery against him; such error, if any, being in his favor. (Boyer v. Anduiza, 163.)

Appeal and Error—Assignments of Error—Sufficiency.

8. Under Supreme Court Rule 12 (173 Pac. x), questions as to evidence or instructions will not be considered unless arising upon the assignments of error. (Boyer v. Anduiza, 163.)

Appeal and Error—Stipulation—Rule of Court—Oral Argument.

9. In view of Rule 22 of the Supreme Court (56 Or. 623, 117 Pac. xii), providing that all motions, unless otherwise ordered, must be submitted without oral argument, and on printed or typewritten briefs, where the records of the Supreme Court fail to show that any application has been made or order granted permitting oral argument of the motion to dismiss appeals when the cause is heard or at any other time, the attorney's stipulation that the motion be argued in the Supreme Court when the cause is heard on the merits will be disregarded. (Lombard v. Bietau, 182.)

Appeal and Error—Acquiescence in Decree—Statute.

10. Under Section 549, L. O. L., providing that any party to a decree other than one given by confession or for want of an answer may appeal, in suit to foreclose a real estate mortgage, where a defendant denied that he had any or claimed to have any interest in the property, also consenting that decree might be rendered on the pleadings against him, his acquiescence having been acted upon, he had no appealable interest in the final decree. (Lombard v. Bietau, 182.)

Appeal and Error—Notice of Appeal—Time for Filing.

11. The service and filing of notice of appeal within the time prescribed by Section 550, L. O. L., as amended by Laws of 1913, Chapter 319, is jurisdictional, and the Supreme Court can neither extend the time nor excuse a failure to file within such time. (Everding & Farrell v. Gebhardt Lum. Co., 207.)

Appeal and Error—Notice of Appeal—Time for Serving and Filing.

12. Service and filing of a notice of appeal within sixty days after the rendition of the judgment are acts absolutely necessary to give the Supreme Court jurisdiction. (Everding & Farrell v. Gebhardt Lum. Co., 207.)

Appeal and Error—Notice of Appeal—Transcript.

13. A transcript must affirmatively show that a notice of appeal was served and filed within sixty days after the rendition of a judgment. (Everding & Farrell v. Gebhardt Lum. Co., 207.)

Appeal and Error—Preservation of Objections—Necessity of Objections—Evidence.

14. In the absence of an objection before the answer of a witness as to ownership of sheep which trespassed on plaintiff's land, the admissibility of such testimony cannot be considered on appeal. (Jones Land & Livestock Co. v. Seawell, 236.)

Appeal and Error—Preservation of Objections—Motion to Strike Evidence.

15. In the absence of a motion to strike answer of witness, admissibility of the evidence cannot be considered on appeal; there having been no objection to question. (Jones Land & Livestock Co. v. Seawell, 236.)

Appeal and Error — Record — Sufficiency — Removal of Cause—Evidence.

16. The contention that the state court lost its jurisdiction on defendant's filing petition and bond for removal to the federal court,

even if otherwise well taken, cannot be sustained, where the bill of exceptions shows no evidence of such filing, although the petition and bond alleged to have been filed were attached to answer as exhibits. (Malloy v. Marshall-Wells Hardware Co., 303.)

Appeal and Error—Review—Bill of Exceptions—Sufficiency.

17. A bill of exceptions setting out the instructions, with exceptions thereto, refused instructions, with exceptions allowed thereto, with exhibits not physically attached to the bill, but certified in trial judge's certificate to contain a complete transcript of the evidence, is sufficient for consideration of rulings on motions for nonsuit and directed verdict. (Malloy v. Marshall-Wells Hardware Co., 303.)

Appeal and Error—Scope—Conflicting Evidence.

18. In servant's action for injuries, the court on appeal cannot disturb the jury's finding that plaintiff was an employee where there was some evidence of that relation. (Malloy v. Marshall-Wells Hardware Co., 303.)

Appeal and Error—Supplemental Record—Finding After Decision.

19. The court will not order a record to be supplemented to present omitted matters concerning an affirmative defense, shown in the petition for rehearing, where the questions arising thereunder have been twice decided adversely to defendant appellant. (Malloy v. Marshall-Wells Hardware Co., 303.)

Appeal and Error—Harmless Error—Overruling Motion for Nonsuit.

20. Any error committed by the court in overruling a motion for nonsuit was cured, if any of the parties afterward introduced evidence sufficient to sustain the verdict. (Hinton v. Roethler, 440.)

Appeal and Error—Review—Evidence.

21. It is the function of the jury to determine the credibility of the evidence, a matter with which the Supreme Court cannot concern itself. (Ahonen v. Hryszko, 451.)

Appeal and Error—Harmless Error—Evidence.

22. In an action for injuries, any error in admission of medical testimony as to composition of skull *held* rendered harmless by witness' assurance he did not know whether or not particular fracture extended into motor area of brain. (Ahonen v. Hryszko, 451.)

Appeal and Error—Disposition—Final Judgment.

23. The judgment of the supreme court is final when the opinion is handed down. (Ahonen v. Hryszko, 451.)

Appeal and Error—Disposition of Cause—Nunc Pro Tunc Order.

24. Supreme Court, after having examined Circuit Court's judgment and entered judgment against appellant and his sureties in accordance with section 559, subdivision 4. L. O. L., will not, upon subsequent death of one of the sureties, direct lower court to enter judgment against sureties upon appeal bond *nunc pro tunc* as of the date of the decision affirming judgment; its function having been exhausted upon affirmance of judgment. (Ahonen v. Hryszko, 451.)

Appeal and Error—Failure to File Abstract and Brief—Affirmance.

25. Where appellant has not filed his abstract or brief within the time required by Supreme Court Rules 6 and 8 (89 Or. 712, 713, 173 Pac. viii), and there has been no extension granted or any excuse offered for the failure, judgment will be affirmed on motion, as provided by Rule 16 (173 Pac. x).—(Van Tassell v. Jefferson County, 600.)

Appeal and Error—Harmless Error—Evidence.

26. In action for injury and loss of property by railroad's foreman of section gang in collision between his outfit train and a freight, any error in admission of railroad's evidence that freight's air-brakes were tested *held* favorable to plaintiff. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

See Justices of the Peace, 1, 2.

ARBITRATION.

See Specific Performance, 1.

ASSIGNMENT.

See Mortgages, 2.

Of Deposit in Court to Avoid Forced Sale.

See Appeal and Error, 5.

Of Lease by Lessee.

See Landlord and Tenant, 2, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Assignments for Benefit of Creditors—Construction of Instrument.

1. Instrument *held* to be bill of sale of business and assets of a partnership, and not an assignment for benefit of creditors, in view of subsequent acts of parties. (St. Helens Quarry Co. v. F. T. Crowe & Co., 284.)

ASSIGNMENTS OF ERROR.

See Appeal and Error, 8.

ASSUMED NAME.

See Parties, 1.

ASSUMPTION OF FACTS.

See Trial, 12, 13, 20.

ATTACHMENT.

Attachment—Second Levy.

1. In levying a second attachment, no affirmative or overt act need be done to divest defendant of possession; the property being in the sheriff's possession by reason of a prior attachment not released, or, what is the same thing, having been placed by the sheriff in charge of a deputy who had receipted to him therefor. (Palmer-Haworth Logging Co. v. Henderson, 192.)

Attachment—Second Levy.

2. It is enough for a sheriff in levying an attachment on property of which he, through a deputy, had possession under prior attachment, to forward the papers to his deputy and make return that the property was attached, provided the return shows that he then held the possession. (Palmer-Haworth Logging Co. v. Henderson, 192.)

Attachment—Return—Amendment.

3. Return of attachment may be amended to supply an omission, except when the right of third persons depending on the defective return have intervened, and therefore against one whose claim is that he obtained a right to the property before attachment. (Palmer-Haworth Logging Co. v. Henderson, 192.)

ATTORNEY AND CLIENT.

Attorney and Client—Fiduciary Relation—Purchase of Mortgage by Attorneys.

1. Attorneys could buy and foreclose mortgage executed by clients, where they did not purchase at discount and undertake to charge clients for full face of mortgage. (Smith v. Boothe, 360.)

Misconduct of Counsel.

See Criminal Law, 3, 4.

Lack of Evidence as to Attorney's Fee.

See Mechanics' Liens, 4.

ATTORNEY IN FACT.

See Husband and Wife, 1.

AUTOMOBILES.

Injuries from Automobile.

See Municipal Corporations, 2–4.
See Railroads, 2, 7.

BANKS AND BANKING.

Banks and Banking—Instructions—Bank's Default in Collection.

1. In action on note, where defendant counterclaimed for proceeds of crop on which rental notes deposited by defendant with plaintiff bank for collection were a lien, and alleged that bank had applied such proceeds to chattel mortgage which it took on such crops, instructions *held* to fairly submit issue of whether the bank had received the rental notes for collection and knew of defendant's lien when it took the chattel mortgage. (La Grand Nat. Bank v. Oliver, 115.)

BILLS AND NOTES.

Bills and Notes—Consideration—Evidence—Sufficiency.

1. In a suit to foreclose a mortgage securing a promissory note, evidence that the proceeds of the note and mortgage were to be

applied to defendant's debts, in connection with the presumption of adequate consideration, sufficiently met plea of want of consideration. (Adjustment Bureau of Portland v. Staats, 125.)

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BRANDS.

See Animals, 1.
See Criminal Law, 7.
See Witnesses, 1, 2.

BURDEN OF PROOF.

See Reformation of Instruments, 2.

CARRIERS.

Carriers—Water Companies—"Common Carrier."

1. A mutual ditch company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of water the quantity to which each is entitled, is not a "common carrier" of water. (Eldredge v. Mill Ditch Co., 590.)

CHARTERS OF CITIES.

Cited and Construed in this Volume.

EUGENE.

See Stephens v. City of Eugene, 167.

PORTLAND.

See State ex rel. v. Kellaher, 538.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

COLLATERAL ATTACK.

See Corporations, 7.
See Highways, 1.

COMMON CARRIERS.

See Carriers, 1.

COMMON LAW.

See Navigable Waters, 1.

COMPROMISE AND SETTLEMENT.

Compromise and Settlement—Giving Note as Prima Facie Evidence.

1. The giving of a promissory note is *prima facie* evidence of an accounting and settlement by the parties of all demands between

them up to the date of the execution of the note. (Gorsline v. Gore, 389.)

Compromise and Settlement—Presumption of Correctness.

2. The presumption is in favor of the correctness of a settlement of accounts between parties, and that a note given for the balance ascertained expresses the truth, so that the account will be opened only upon clear and satisfactory proof of error or mistake. (Gorsline v. Gore, 389.)

Compromise and Settlement — Reopening Accounts — Error and Mistake—Evidence.

3. In a suit by a brother to reopen an account between his sister and their deceased father which had been settled by agreement and the sister's note for balance due given, and later paid in full, evidence of errors and mistakes involving duplicate receipts *held* not sufficiently clear and satisfactory. (Gorsline v. Gore, 389.)

CONCLUSION OF LAW.

See Pleading, 4, 5, 8.

CONCLUSIVENESS.

See Corporations, 14.
See Judgment, 3.

CONDITIONAL SALES.

See Sales, 4–6.

CONSIDERATION.

See Bills and Notes, 1.
See Contracts, 6.
See Mortgages, 5, 6.
See Sales, 7.

CONSTITUTIONAL LAW.

Constitutional Law—Amendment of State Constitution—Submission and Adoption.

1. Article II, Section 14–a, of the Constitution, adopted June 4, 1917, relative to the time of municipal elections, *held*, properly submitted by the legislature, and legally adopted, as required by Article XVII, section 1. (State ex rel. v. Kellaher, 538.)

Constitutional Law—Self-executing Provisions—Municipal Elections.

2. Article II, Section 14–a, of the Constitution, as to time of municipal elections, adopted June 4, 1917, *held* of its own force to have changed date of next succeeding municipal election of City of Portland from June 2, 1919, to November 5, 1918. (State ex rel. v. Kellaher, 538.)

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

Amendment of.

See Constitutional Law, 1.

Self-executing Provisions.
See Constitutional Law, 2.

CONSTRUCTION.

See Assignments for Benefit of Creditors, 1.
See Contracts, 1, 2, 5, 10.
See Exceptions, Bill of, 2.
See Mortgages, 3.
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See Statutes, 4, 5.
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See Wills, 1–7.

CONSTRUCTIVE NOTICE.

See Municipal Corporations, 6.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 14.
See Municipal Corporations, 3.
See Railroads, 6.

CONTRACTS.

Contracts—Construction—Incorporation by Reference.

1. A reference in a subcontract to the general contract for a particular purpose makes it a part of the subcontract only for the specified purpose. (Wallace v. Oregon Engineering Co., 31.)

Contracts—Construction—Incorporation by Reference.

2. An agreement that contractor shall not sublet the work without the written consent of the original contractee is for the benefit of, and may be waived by the latter. (Wallace v. Oregon Engineering Co., 31.)

Contracts—Conditions Against Subletting—Effect.

3. A contractor may make a valid contract to sublet the work, although in violation of the provision of the original contract prohibiting subletting without the written consent of original contractee, after which the securing of consent is the duty of contractor and not of subcontractor. (Wallace v. Oregon Engineering Co., 31.)

Contracts—Written Contracts—Presumption.

4. It is presumed that all the terms of a written contract are embraced therein, and, where there is no provision that subcontractor should obtain the consent of original contractee to the subletting, none will be presumed. (Wallace v. Oregon Engineering Co., 31.)

Contracts—Construction—Settlement of Disputes.

5. A provision in a general contract that the engineer shall settle disputes *held* not to authorize the engineer to decide the validity of a contract between contractor and subcontractor, nor oust the jurisdiction of the courts in actions for breach thereof. (Wallace v. Oregon Engineering Co., 31.)

Contracts—Modification—Consideration.

6. Promise by a contractor, threatening to abandon his contract, to continue with the contract, was not considered for a promise to pay additional compensation. (Hoskins v. Powder Land & Irr. Co., 217.)

Contracts—Extra Work—Conditions.

7. A contractor cannot recover for extra work done under a contract providing that no extra work should be done except upon written directions given by a certain person, unless such written directions were given, or it is shown that such condition was waived. (Hoskins v. Powder Land & Irr. Co., 217.)

Contracts—Performance—Decision of Engineer.

8. Where contract provides that the decision of a certain engineer as to the amount of dirt in a grade should be conclusive between the parties, a decision of such engineer can only be impeached for fraud or on other equitable grounds. (Hoskins v. Powder Land & Irr. Co., 217.)

Contracts—Necessity of Performance—Losses.

9. When one agrees to perform an undertaking he must do so, although it entails a loss upon him. (Hoskins v. Powder Land & Irr. Co., 217.)

Contracts—Construction—Separate Instrument.

10. Where two instruments are executed at the same time between the same parties, covering the same subject matter, they will be construed together as constituting one agreement. (Temple v. Harrington, 295.)

Contracts—Modification or New Contract.

11. A contract *held* not a modification of a contract by which plaintiff was to receive stock for services, but a new and independent contract, whereby the stock due plaintiff was to be delivered or exchanged for liens. (Aya v. Morson, 647.)

See Corporations, 3, 4.
See Fixtures, 1.
See Fraud, 2, 4.
See Sales, 1–3, 6, 8–14.
See Specific Performance, 3.
See Statute of Frauds, 3, 4.
See Vendor and Purchaser, 3–8.

Construction of Agreement to Devise Land.

See Specific Performance, 2.

Ratification After Majority.

See Infants, 1.

CONTRIBUTORY NEGLIGENCE.

See Municipal Corporations, 8.

CORPORATIONS.

Corporations — Insolvency — Preferred Stock—"Stockholder"—"Creditor."

1. Where a corporation, without statutory authority, secures the redemption of preferred stock by trust deeds on land, the holders of the stock are stockholders merely, and not creditors, and upon failure to redeem the certificates do not have a preference over general creditors. (Hewitt v. Linnhaven Orchard Co., 1.)

Corporations—Representations by Agent as to Stock.

2. The statement by an agent, selling preferred stock certificates, that they were secured by mortgages and were practically bonds, would not change the rights and liabilities of the purchaser, which are measured by his stockholders' contracts. (Hewitt v. Linnhaven Orchard Co., 1.)

Corporations—Preferred Stock—Subscription Contract—Validity.

3. An agreement that preferred stock shall have priority over the general indebtedness of the corporation is void as to subsequent creditors, being against public policy. (Hewitt v. Linnhaven Orchard Co., 1.)

Corporations—Sale of Stock—Nature of Contract.

4. The circumstances surrounding the issue of preferred stock *held* to evidence a sale of stock, and not a borrowing transaction. (Hewitt v. Linnhaven Orchard Co., 1.)

Corporations—Mortgage—Priority.

5. A trust deed given as a mortgage to secure redemption of preferred stock is valid as a prior lien as against claims of common stockholders. (Hewitt v. Linnhaven Orchard Co., 1.)

Corporations—Statements and Admissions of Officers.

6. That when credit was extended to the G. Company, and when property was attached, persons who were president, secretary, and general manager both of it and the P. Company, having the same officers and stockholders, pointed out the property as that of the G. Company, is *prima facie* binding on the P. Company in replevin by it against the officer making the attachment, preventing direction of verdict for it. (Palmer-Haworth Logging Co. v. Henderson, 192.)

Corporations—Classes—"De Jure Corporations"—"De Facto Corporations."

7. As to ability to transact business, corporations may be divided into "*de jure* corporations," with organization entirely and legally perfected, "*de facto* corporations," where there has been a *bona fide* attempt to organize, and a user of corporate powers, with a defective organization, and corporations not sufficiently organized, to come within the latter class. (Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.)

Corporations—De Facto Corporations—Collateral Attack.

8. The legality of a corporation *de facto* cannot be inquired into collaterally unless on attack by the state. (Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.)

Corporations—Foreign Corporations—Jurisdiction of State Courts.

9. In determining authority of agent of foreign corporation in its relation to question whether corporation is doing business within the state, so as to be subject to jurisdiction of its courts, the agent's written contract of appointment must be taken as a whole, and question must turn upon the manner in which he was to carry out appointment. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations — Foreign Corporations — Jurisdiction "Doing Business" Within the State.

10. Contract between agent, engaged in soliciting business in state, and defendant harvester company, a foreign corporation, *held* to give to agent no authority further than to solicit, etc., so that defendant was not "doing business within the state" and was not subject to jurisdiction of courts of state, under Section 528, L. O. L., as amended by Laws of 1911, page 148. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations—Foreign Corporations—Subjection to State Laws.

11. Until a foreign corporation comes within the state to "do business" as the term would be applied to an instance, where it permanently locates and actually transacts its business, the state laws cannot have any effect upon it. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations—Foreign Corporations—Jurisdiction of State Courts.

12. Mere solicitation, within a state, of orders to be sent out to home office of a foreign corporation as offers to be accepted there or rejected, constitutes interstate commerce and does not amount to corporations coming into the state, so as to subject itself to that jurisdiction. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations—Foreign Corporations—Jurisdiction of State Courts.

13. While it is possible for a foreign corporation to become subject to jurisdiction of Oregon courts, even while transacting interstate commerce, that result is not to be predicated upon the fact that an agent only solicited residents to send out of the state an offer to be accepted and filled in another state. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations — Foreign Corporations — Process—Return—Conclusiveness.

14. Sheriff's return of service of summons, reciting that defendant, foreign corporation, was at time of service doing business within the state, is not conclusive upon the court when called upon to decide its own jurisdiction. (Deardorf v. Idaho Nat. Harvester Co., 425.)

Corporations—"Public Service Corporation"—Ditch Companies.

15. A mutual water company, organized for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled without profit, is not a "public service corporation," as that term is usually applied. (Eldredge v. Mill Ditch Co., 590.)

See Waters and Watercourses, 5.

COSTS.

Costs—Costs on Trial After a Mistrial.

1. Where the first trial resulted in a failure of agreement by the jury, plaintiff, who was successful at the second trial, *held* entitled to all his costs and necessary disbursements in both trials. (Jones Land & Livestock Co. v. Seawell, 236.)

COUNTERCLAIM.

See Setoff and Counterclaim.

COURTS.

Courts—County Court—Proceedings—Pleading.

1. Proceedings in County Court are somewhat informal, no definite rules of pleading being prescribed by the Code for that court. (Dickenson v. Henderson, 408.)

Courts—Extraterritorial Effect.

2. The laws of a state have no extraterritorial effect. (Deardorf v. Idaho Nat. Harvester Co., 425.)

CREDIBILITY.

See Witnesses, 5.

CRIMINAL LAW.

Criminal Law—Evidence—Corroboration of Accomplice—Sodomy.

1. The objection that corroboration of the prosecuting witness in a sodomy case is necessary on the accomplice theory is untenable, where the jury found such witness resisted the commission of the act. (State v. Kapsales, 56.)

Criminal Law—Review—Jury as Sole Judge of Facts.

2. The jury is the sole judge of the facts in a sodomy prosecution, and a conviction will not be disturbed, where the record discloses evidence sufficient for submission to the jury. (State v. Kapsales, 56.)

Criminal Law—Review—Misconduct of Counsel—Favorable Ruling.

3. Appellant, convicted of crime, cannot complain of a ruling of court stopping alleged improper remarks of the district attorney. (State v. Kapsales, 56.)

Criminal Law—Objection—Remarks of Counsel.

4. Where no objection was made nor ruling had on alleged improper remarks of counsel, the appellate court cannot review the matter. (State v. Kapsales, 56.)

Criminal Law—New Trial—Motion—Sufficiency.

5. A motion for new trial for misconduct of the district attorney and supporting affidavit *held* to be conclusions drawn from the evidence, and not the evidence nor facts called for by Section 177, L. O. L., when made on grounds provided for in Section 174, subdivisions 1, 2, 3, or subdivision 4. (State v. Kapsales, 56.)

Criminal Law—Evidence—Diagram of Brand.

6. Admission of diagram of brand on a horse, alleged to have been stolen, drawn by the witness, was not error despite a statement by the witness that he did not know whether he could make the "sketch as crooked as the original brand." (State v. Morris, 60.)

Criminal Law—Evidence of Other Offenses—System.

7. In a prosecution for the larceny of a horse, evidence that, about the time of the theft, other animals owned by other parties were also found in his possession or claimed by him, was admissible as showing a system of crimes. (State v. Morris, 60.)

Criminal Law—Best Evidence—Change of Brand.

8. In a prosecution for the larceny of a horse, it was not error to refuse to receive in evidence the contents of a letter claimed by defendant to have been received from the state veterinarian authorizing him to change his brand, such change of brand being provable as a public record. (State v. Morris, 60.)

Criminal Law—Instructions—Form and Defect.

9. In a prosecution for the larceny of a horse, an instruction as to the purpose for which evidence of brands was admitted *held* correctly refused as requiring a declaration of legal effect of the evidence and as emphasizing evidence. (State v. Morris, 60.)

Criminal Law—Verdicts—Degree of Offense.

10. Generally a verdict of guilty need not specify the degree of crime of which defendant is convicted; a verdict of guilty as charged in the indictment finding the defendant guilty of highest degree therein charged. (State v. Shuster, 243.)

Criminal Law—Proof Beyond Reasonable Doubt.

11. A prosecution under Laws of 1917, page 175, for failure to support his child, being a criminal action, the state must prove beyond a reasonable doubt that defendant failed and neglected without just or sufficient cause to support his child. (State v. Langford, 251.)

Criminal Law—Instructions.

12. The refusal of requested instructions covered by those given is not error. (State v. Stickel, 415.)

Criminal Law—Request Covered by Instructions.

13. In a prosecution for the larceny of cattle, refusal of defendant's requested instructions that, before the jury could convict they must believe defendant was guilty of or in complicity with the original taking, *held* not erroneous; the instructions given presenting the same theory. (State v. Stickel, 415.)

Criminal Law—Proof of Other Sales—Admissibility.

14. In prosecution under Laws of 1917, page 46, section 1, amending Section 5, Laws of 1915, page 151, for unlawful sale of intoxicants, evidence of other like sales was admissible in view of Laws of 1915, page 169, Section 39, to show character of business done by accused, etc. (State v. Busick, 466.)

Criminal Law — Witness Employed to Obtain Evidence — "Accomplice."

15. One employed to make purchase of intoxicants for purpose of appearing as witness against defendant was not an "accomplice," within Sections 1540, 2370, L. O. L., so that conviction could be had on his uncorroborated testimony; the crime being the sale and not the purchase. (State v. Busick, 466.)

Criminal Law—Harmless Error—Admitting Evidence—Unresponsive Answers.

16. In prosecution for cruelty to a horse, error, if any, in permitting the question to be asked how long defendant rode the horse, was harmless, where the answer was unresponsive so that the question was never answered. (State v. Goodall, 485.)

Criminal Law—Directing Verdict.

17. Discrepancies between witnesses called by state do not of themselves entitle a defendant to a directed verdict. (State v. Bailey, 627.)

Criminal Law—Harmless Error—Cross-examination.

18. Error in sustaining an objection to cross-examination was cured by subsequent answers of the witness giving the desired information. (State v. Bailey, 627.)

Criminal Law—Evidence—Other Crimes.

19. In robbery prosecution for taking a note, it was admissible to introduce evidence concerning the taking of a deed, where there was evidence in the record from which the state could argue to the jury that the accused conceived the single plan of securing possession of both the note and the deed, both having been taken in the course of a day and a half, in which time the prosecuting witness was held prisoner by the accused. (State v. Bailey, 627.)

Criminal Law—Evidence—Other Crimes.

20. Evidence which is relevant to the issue is not made inadmissible merely because it tends to prove the commission of another crime. (State v. Bailey, 627.)

Criminal Law—Opinion—Signatures.

21. A bank president, who had seen signatures on checks which had been charged against an accused, possessed the qualification, required by Section 787, L. O. L., to testify that a certain signature was that of the accused. (State v. Bailey, 627.)

Criminal Law—Evidence—Res Inter Alios Acta—Check Stubs—Correspondence.

22. Correspondence and check stubs which an accused had never seen or known of were inadmissible in evidence against him. (State v. Bailey, 627.)

Criminal Law—Evidence—Case in Chief.

23. In a prosecution for robbery, where defendant was charged with taking a note, it was competent to show as a part of the state's case in chief that accused had cashed a check at a bank; prosecut-

ing witness having testified that the note taken was given to cover, among other things, a loan made by giving the defendant such a check. (State v. Bailey, 627.)

CROSS-EXAMINATION.

See Criminal Law, 18.
See Witnesses, 4, 8.

CROSSING ACCIDENTS.

See Railroads, 1–10.

CRUELTY.

See Animals, 5, 6.

CUSTODY AND SUPPORT.

See Divorce, 1.
See Parent and Child, 1–11.

DAMAGES.

Damages—Personal Injuries—Future Damages.

1. Plaintiff need not prove the future effect of his personal injury beyond a reasonable doubt, but only to a reasonable certainty, which is not negatived by a mere possibility of plaintiff's not suffering any future damages. (Ahonen v. Hryszko, 451.)

Damages—Instructions.

2. In action for injury at railroad crossing, instruction on damages *held* not erroneous though subject to criticism. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Damages—Elements—Loss of Property—Evidence.

3. In action for injuries and loss of property by railroad's foreman of section gang, court properly refused to allow plaintiff to answer whether he made any profit out of boarding men on his outfit train, with which another train collided, his claim being for reasonable value of his lost goods. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

See Eminent Domain, 2.
See Fraud, 5.

Unliquidated Damages.

See Account Stated, 1.

DECLARATIONS.

See Evidence, 4.

DEEDS.

Deeds—Presumption—Acquisition of Title to Land in Plat.

1. In ejectment, defendants cross-complaining for equitable relief, in absence of testimony outside of deeds of cross-complainants' predecessors, it must be assumed predecessors acquired title to lots described in their deeds as such lots appeared on then recorded plat of addition. (Miller v. Fisher, 111.)

DE FACTO CORPORATIONS.
See Corporations, 7, 8.

DE JURE CORPORATIONS.
See Corporations, 7.
See Waters and Watercourses, 3.

DEMURRER.
See Abatement and Revival, 1.
See Pleading, 3.

DEPARTURE.
See Pleading, 6.

DESERTION.
See Divorce, 2–5.

DISMISSAL AND NONSUIT.
See Appeal and Error, 20.
See Judgment, 2.
See Trial, 2.

DITCH COMPANIES.
See Corporations, 15.
See Waters and Watercourses, 5.

DITCHES.
See Waters and Watercourses, 2.

DIVORCE.

Divorce—Duty to Support—Effect of Decree.

1. A decree of divorce awarding custody of the minor child of the marriage to the mother is not *res judicata* as to the duty of the father to support. (State v. Langford, 251.)

Divorce—Suit Based on Desertion—Evidence Admissible.

2. Where, in divorce suit charging desertion from and after a certain date, plaintiff's testimony showed that on such date the parties were not living together, evidence as to plaintiff's misconduct was properly admitted, although defendant's answer was in effect a general denial. (Wilhelm v. Wilhelm, 435.)

Divorce—"Desertion."

3. Separation alone is not desertion. (Wilhelm v. Wilhelm, 435.)

Divorce—Desertion—Essential Proof.

4. Where, in divorce suit charging desertion from and after a certain date, plaintiff's evidence disclosed that the parties were living separate on such date, it became necessary as a part of plaintiff's case to prove that the separation was such that it would constitute a desertion, if continued for a year from that date. (Wilhelm v. Wilhelm, 435.)

Divorce—Desertion—Evidence—Sufficiency.

5. Defendant's offer to resume living with plaintiff, made within a year after their initial separation, would break the period of desertion, and it was incumbent upon plaintiff, if he wished to start the statutory period of desertion, to give notice to defendant of his desire to have her return to him. (Wilhelm v. Wilhelm, 435.)

Divorce—Decree Denying Divorce—Review.

6. Trial court having had the opportunity of hearing the witnesses in the instant case, and also in prior divorce suit between the parties, court on appeal will give some weight to findings of trial court in reviewing decision denying divorce. (Wilhelm v. Wilhelm, 435.)

DOWER.

Dower—Purchase-money Mortgages—Statutes.

1. Where a husband purchased land, at which time he received a deed and executed a mortgage in an amount equal to the unpaid portion of the purchase price, the two will be construed together, and the mortgage will be construed to be a purchase-money mortgage, under Section 7289, L. O. L., and wife will not be entitled to dower as against mortgagee. (Temple v. Harrington, 295.)

EJECTMENT.

Ejectment—Evidence—Tax Receipts.

1. In ejectment, payment of taxes on either of the lots involved, by any person, was not evidence upon any disputed fact in the case, so that tax receipts offered by cross-complainants were inadmissible. (Miller v. Fisher, 111.)

See Deeds, 1.

ELECTION.

To Fill Unexpired Term of Commissioner.

See Constitutional Law, 2.
See Municipal Corporations, 5.

ELECTION OF REMEDIES.

See Fraud, 3.
See Sales, 9–14.

EMBEZZLEMENT.

Embezzlement—Verdict—Amount of Money.

1. Verdict finding defendant "guilty as charged in the indictment," which specified amount of money embezzled, was sufficient compliance with Section 1958, L. O. L., providing that verdict finding a public official guilty of larceny must ascertain as near as may be the amount of money taken. (State v. Shuster, 243.)

EMINENT DOMAIN.

Eminent Domain—Remedy of Riparian Owner—Injunction—Flowage.

1. Where city constructed power plant, and for operation thereof conducted water from river and discharged it in large quantities into

slough, materially increasing the accustomed flow, to the damage of lower riparian owner of land on both banks of slough, such discharge constituted a continual trespass, which riparian owner could have enjoined. (Stephens v. City of Eugene, 167.)

Eminent Domain—Remedy of Owner—Damages.

2. Where city diverted water from river for operation of water plant, and discharged it into a slough in large quantities, materially increasing accustomed flow, so that lower riparian owner of land on both banks of slough could not ford the slough, as he had prior thereto been doing, and was compelled to go two miles out of his way to reach his plow land, he was entitled to damages. (Stephens v. City of Eugene, 167.)

Eminent Domain — Discharge of Water into Slough — Injunction — Relief.

3. Equity, in action to enjoin city from discharging water used in operation of waterworks into slough, to the damage of lower riparian owner, cannot condemn land for such purposes and fix amount to be paid owner. (Stephens v. City of Eugene, 167.)

EMPLOYERS' LIABILITY ACT.

See Master and Servant, 2–18.

EQUITABLE INTERESTS.

See Execution, 3.

ESTOPPEL.

Estoppel—Sale of Land—Correction of Original Plat.

1. Where lots in block of an addition to a city were purchased and conveyed, any subsequent attempt by sellers to correct or amend original map or plat by which lots were indicated was void as to purchaser. (Miller v. Fisher, 111.)

See Judgment, 2.
See Landlord and Tenant, 1.
See Vendor and Purchaser, 2.

EUGENE, CHARTER OF.

See Stephens v. City of Eugene, 167.

EVIDENCE.

Evidence — Writing of Deceased Person — Affidavit of Grantor — Statute.

1. Under Section 790, L. O. L., providing when writings of deceased persons are admissible, in ejectment, *ex parte* affidavit of predecessor in title of all parties, made more than twenty-four years after execution of deed by himself and wife to plaintiffs' immediate predecessor, and five years before institution of action in ejectment, *held* inadmissible. (Miller v. Fisher, 111.)

Evidence—Presumptions—Filing of Papers.

2. There is no presumption as to when an attorney files a paper, or that he has filed it within the time prescribed by statute. (Everding & Farrell v. Gebhardt Lum. Co., 207.)

Evidence—Opinion—Weight.

3. Testimony of an engineer, who went over the ground before a grade was put in, as to the amount of dirt there was in the grade when completed, must prevail over that of another engineer, who did not go upon the ground until after the completion of the grade. (Hoskins v. Powder Land & Irr. Co., 217.)

Evidence—Declaration—Ownership of Sheep.

4. In view of Section 799, Subsection 11, L. O. L., stating the presumption that things in the possession of a person are owned by him, declarations of a sheep herder in possession of sheep that defendant was the true owner are admissible in an action for trespass by the sheep. (Jones Land & Livestock Co. v. Seawell, 236.)

Evidence—Expert Opinion—Medical Testimony.

5. In action for injuries, testimony of doctor that skull consists of two tables of bone, with spongy bone between them, and that fracture might extend farther on inside than on outside, was proper expert testimony. (Ahonen v. Hryszko, 451.)

Evidence—Parol Evidence—Varying Writing.

6. It is permissible for a party to a written instrument to explain it and vary its terms, in litigation between himself and strangers to the document. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Evidence—Presumption—Proper Conduct—Speed of Train.

7. The law presumes that the usual rate of speed of trains over a given crossing is reasonable, and not negligent. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Evidence—Loss of Property—Res Gestae.

8. In action against railroad by foreman of section gang who was injured and lost his property when his outfit train was run into by another, evidence that belongings of crew were gathered up, put into bundles, and checked to a point as baggage, etc., *held* properly submitted to jury as part of the *res gestae* on issue of the destruction of the property. (Andrew v. Oregon-Wash R. & N. Co., 611.)

Evidence—Judicial Notice—Carey Act Liens.

9. The Carey Act liens being provided for by law and by executive act, judicial notice will be taken thereof under Section 729, subdivision 3, L. O. L. (Aya v. Morson, 647.)

See Appeal and Error, 16, 18, 21, 22, 26.
See Animals, 1.
See Bills and Notes, 1.
See Compromise and Settlement, 3.
See Criminal Law, 1, 6, 7, 11, 14–16, 19, 20, 22, 23.
See Damages, 3.
See Divorce, 2, 4, 5.
See Ejectment, 1.
See Fraud, 7, 11.
See Insane Persons, 3.
See Larceny, 1–3.
See Logs and Logging, 1, 2.
See Master and Servant, 2–4, 20, 22, 23.
See Mechanics' Liens, 4.

See Mortgages, 6.
See Navigable Waters, 9.
See Parent and Child, 11.
See Pleading, 7.
See Principal and Agent, 2.
See Replevin, 2.
See Robbery, 1–3.
See Statute of Frauds, 1.
See Trial, 6, 8, 21.
See Trusts, 3.
See Witnesses, 3, 4.

Necessity of Preservations of Objections.
See Appeal and Error, 14, 15.

Giving Note as Prima Facie Evidence.
See Compromise and Settlement, 1.

EXCEPTIONS, BILL OF.

Exceptions, Bill of—Typewritten Sheets—Necessity of Signature of Judge.

1. Typewritten sheets, signed by court reporter, purporting to state what occurred on presentation of plaintiff's motion to dismiss appeal from a Justice Court, lacking certificate of trial judge, and failing to meet requirements of bill of exceptions, were not sufficient as such. (St. Helens Lumber Co. v. Evans, 71.)

Exceptions, Bill of—Form—Constitution—Statute—Construction.

2. Article VII, Section 3, of the Constitution, as amended (see Laws 1911, p. 7), provides that upon appeal either party may have attached to the bill of exceptions the whole testimony, instructions, and other material matter, and Laws of 1913, page 651, re-enacts Section 171, L. O. L., with the further proviso that the bill of exceptions may consist of a transcript of the whole testimony and proceedings of the trial, the instructions and any other matter material to the decision on appeal, etc., a bill of exceptions conforming to the proviso requires review of instructions. (Malloy v. Marshall-Wells Hardware Co., 303.)

See Appeal and Error, 17.

EXCUSE.

For Nonsupport of Child.
See Parent and Child, 8, 9.

EXECUTION.

Execution—Custody of Property—Delivery to Bailee.

1. An officer making levy of an execution may, at his own risk, deliver the property levied upon to a bailee and take a receipt therefor, and in such case the goods are regarded as still being in his custody. (Sabin v. Chrisman, 85.)

Execution—Wrongful Execution—Liability of Plaintiff in Writ.

2. Where an officer levies a writ of execution on the property of a stranger, the latter may sue plaintiff in the writ, either for reclama-

tion of the property or to recover damages, though property was destroyed or sold subsequent to wrongful levy. (Sabin v. Chrisman, 85.)

Execution—Property Subject to Levy—Equitable Interests.

3. Intangible and uncertain interests which involve the rights of third parties, such as an equitable title in land where the legal title is not in the debtor, are not subject to execution. (Eldredge v. Mill Ditch Co., 590.)

Execution—Property Subject to Levy—Trusts.

4. Equity will not permit the levy of an execution upon a legal title held by a debtor as trustee for a third party, as in the case of an assignee for the benefit of creditors or an ordinary naked trust. (Eldredge v. Mill Ditch Co., 590.)

Execution—Property Subject to Levy—Untransferable Interests.

5. Interests which cannot be transferred, such as franchises of corporations, rights to office, etc., are not subject to execution. (Eldredge v. Mill Ditch Co., 590.)

Execution—Property Subject to Levy—Public Interest.

6. Property which is so involved with the interest of the public that it cannot be levied upon and sold without interfering with the rights of the public, such as corporations like canals and railways, is not subject to execution. (Eldredge v. Mill Ditch Co., 590.)

Execution—Property Subject to Levy—Mutual Water Companies.

7. Property of a mutual water company, not organized for the purpose of selling water or as a profit corporation but for the sole purpose of transmitting and delivering to appropriators and owners of the water the quantity to which each is entitled, the relation of the corporation being that of a holding company, trustee or agent, is not subject to levy and sale under execution. (Eldredge v. Mill Ditch Co., 590.)

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators — Powers of Administrator — Lease of Realty.

1. An administratrix entitled to the possession and control of decedent's premises as such may lease them to a third party. (Boyer v. Anduiza, 163.)

Executors and Administrators—Power of Sale in Will—Individual Interest of Wife.

2. Where testator directed his "executrix" to sell his property, and in subsequent clause appointed his wife executrix, the wife had no power in her individual capacity to sell for her own use. (Beakey v. Knutson, 574.)

Executors and Administrators—Power of Sale—Right to Mortgage Property.

3. Where testator in one clause gave executrix "authority to sell, dispose of, and use in any way she may deem proper," and in subsequent clause directed "that she use such or all of the money which

may be the proceeds of any property she may sell" for purpose of educating and caring for children, the general words in first clause are governed by particular words of subsequent clause, and gave wife no power except to sell property for purpose of educating and caring for the children and gave no power to mortgage the property. (Beakey v. Knutson, 574.)

Executors and Administrators—Sale of Property—Rights of Purchaser.

4. One who pays money on a legitimate transfer of property by an executor is not bound to see that it is rightfully applied. (Beakey v. Knutson, 574.)

Executors and Administrators—Unauthorized Sale—Duty of Purchaser.

5. One who pays money on transfer of property by executor that appears by the record to be unauthorized takes nothing, being bound to take notice of scope of power and manner of its execution as prescribed by will. (Beakey v. Knutson, 574.)

EXPERT TESTIMONY.

See Evidence, 5.

FIDUCIARY RELATIONS.

See Attorney and Client, 1.

FINDINGS OF FACT.

See Trial, 3.

FIXTURES.

Fixtures—Mortgagee—Agreement Between Landlord and Tenant.

1. While an agreement between the owner of a lot and the tenant that a building be regarded as personalty is valid and binding as between them, it is not binding on an innocent purchaser or mortgagee, without notice or knowledge of such agreement. (Lees v. Hobson, 248.)

FORECLOSURE.

Foreclosure of Lien on Logs.

See Logs and Logging, 1, 2.

FOREIGN CORPORATIONS.

See Corporations, 9–14.

FORFEITURE.

See Vendor and Purchaser, 4–6.

FRAUD.

Fraud—Waiver—Performance After Discovery of Fraud.

1. Where one who has been induced through fraud to enter into contract discovers the fraud while contract is wholly executory, he waives the fraud by wholly or partly performing the contract. (McCabe v. Kelleher, 45.)

Fraud—Part Performance of Contract—Waiver.

2. But he does not waive the fraud by partly performing the contract before discovering the fraud. (McCabe v. Kelleher, 45.)

Fraud—Election of Remedies.

3. A person who has been induced through fraud to enter into contract and partly performs his part of contract before discovering fraud may keep what he has acquired by the contract and sue for damages, or may rescind contract absolutely and sue in action at law to recover consideration, or may sue in equity to rescind contract and obtain full relief in such action. (McCabe v. Kelleher, 45.)

Fraud—Actions—Rescissions of Contract.

4. Where a person who has been induced to enter into a contract through fraud, elects to retain what he has received and bring an action at law to recover the damages sustained, he is not required to rescind the contract. (McCabe v. Kelleher, 45.)

Fraud—Action for Damages.

5. Grantees who were induced through fraud to purchase property, instead of rescinding transaction upon discovery of fraud, could keep the property and sue for damages. (McCabe v. Kelleher, 45.)

Fraud—Payments With Notice of Fraud—Waiver.

6. Grantees who purchased property because of fraudulent representations did not, by making payments on notes given for part of purchase price after discovery of fraud, waive their right to sue grantor for damages. (McCabe v. Kelleher, 45.)

Fraud — Conveyance — Evidence — Payments Made With Notice of Fraud.

7. In grantees' action against grantor for damages for fraudulent representations, evidence of payments on notes made by grantees after discovery of fraud may have some value on question of whether grantees were really deceived, or whether their grievance is a mere afterthought growing out of dissatisfaction. (McCabe v. Kelleher, 45.)

Fraud—Misrepresentation—Opinions—Dealer's Talk.

8. Representations as to value of land and assertions in commendation of land commonly called "dealer's talk" are mere expressions of opinion and not actionable fraud. (McCabe v. Kelleher, 45.)

Fraud—Opinion—Worth of Property.

9. Statements by purchasers of mortgage, attorneys for mortgagors, that premises were not worth more than was due them, and that they had procured all rights and title of mortgagors, made to mortgagors, were mere matters of opinion, not constituting actionable fraud. (Smith v. Boothe, 360.)

Fraud—Unactionable Threat or Bluff.

10. Statement by purchasers of mortgage, attorneys for mortgagors, to the mortgagors, that they, the purchasers, had been damaged in reputation and would not permit redemption after foreclosure by them without paying damages in addition to money required to

redeem, was a mere threat, not constituting actionable fraud on the mortgagors. (Smith v. Boothe, 360.)

Fraud—Allegations—Sufficiency of Evidence to Sustain.

11. In suit by mortgagors against attorneys, purchasers of mortgage, who foreclosed, and, as it was alleged, by false statements prevented mortgagors from securing money to redeem, evidence *held* insufficient to sustain allegations, having shown merely that defendants stood on legal rights as purchasers at execution sale under decree in foreclosure suit. (Smith v. Boothe, 360.)

See Vendor and Purchaser, 1, 2.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

See Replevin, 2.

GIFTS.

Gifts—To Parent—Proof—Equity Rule—Applicability.

1. Where the mother in a divorce settlement transfers some of her property to her daughter on the promise of the daughter, then a minor, to reconvey the same when she became of age, such reconveyance a year and a half after the daughter becomes of age does not constitute a gift to the mother, and the rule that requires a parent to prove that the transaction was *bona fide*, free from force, duress or undue influence and not manifest in gross detriment of the child's interest, does not apply. (Haldeman v. Weeks, 201.)

GUARDIANSHIP.

See Insane Persons, 1–3.

HARMLESS ERROR.

See Appeal and Error, 2, 20, 22, 26.
See Criminal Law, 16, 18.

HIGHWAYS.

Highways—Order—Opening Road—Collateral Attack.

1. A complaint seeking to remove as a cloud on the title, and to set aside, an order of the County Court opening a road across plaintiff's land, is not a collateral, but a direct, attack upon the order of the County Court. (Christensen v. Lane County, 401.)

Highways—Complaint—Sufficiency.

2. Complaint in land owner's action to remove cloud on title and to set aside alleged void order of County Court establishing road over her land *held* to allege sufficiently the lack of jurisdiction of the County Court to make the order. (Christensen v. Lane County, 401.)

Highways—Setting Aside Order—Negligence of Party.

3. In action to remove cloud from title and to set aside an order of the County Court establishing a highway across plaintiff's land,

allegation that plaintiff, being unfamiliar with road establishment, relied on what the county judge told her husband as to notice of the proceedings, was a mere confession of negligence, and afforded no ground for setting aside the order establishing the road. (Christensen v. Lane County, 401.)

Construction of New Highways.
See Railroads, 11.

HUSBAND AND WIFE.

Husband and Wife—Attorney in Fact.

1. Where a husband signs a mortgage personally, the signing of his name again after the name of his wife would have the legal effect of being the signature of the wife by the husband, as her attorney in fact, especially where the note is so signed. (Temple v. Harrington, 295.)

IMPEACHMENT.
See Witnesses, 6–9.

IMPUTED NEGLIGENCE.
See Negligence, 2–7.

INCAPACITY.
See Insane Persons, 3.

INDICTMENT.
See Intoxicating Liquors, 1.

INFANTS.

Infants—Contracts—Ratification After Majority.

1. A minor's contract to deed to her mother lands received from her mother in a divorce settlement is voidable, and is ratified by the daughter deeding such property to her mother after becoming of age. (Haldeman v. Weeks, 201.)

INITIATIVE.
See Statutes, 6.

INJUNCTION.
See Eminent Domain, 1, 3.
See Waters and Watercourses, 2.

INSANE PERSONS.

Insane Persons—Proceedings for Guardianship—Pleading—Jurisdiction.

1. To give the County Court jurisdiction of a petition for the appointment of a guardian for an alleged insane person, nothing more is necessary than to plead substantially the words of the statute; that is, that the person is insane or incapable of conducting his own affairs. (Dickenson v. Henderson, 408.)

Insane Persons—Guardianship—Right of Children.

2. Neither son nor daughter of an aged and somewhat feeble and childish woman has any such interest in her property as to entitle

them as of right to seek appointment of guardian over her estate in order to preserve it for them. (Dickenson v. Henderson, 408.)

Insane Persons—Guardianship—Incapacity—Evidence.

3. On a daughter's petition for appointment of a guardian of the estate and person of her mother, evidence *held* insufficient to prove the mother was incapable of conducting her own affairs. (Dickenson v. Henderson, 408.)

INSANITY.

See Pleading, 5.

INSOLVENCY.

See Corporations, 1.

INSTRUCTIONS.

See Appeal and Error, 2.
See Banks and Banking, 1.
See Criminal Law, 8, 12, 13.
See Damages, 2.
See Master and Servant, 12–14.
See Pleading, 8.
See Railroads, 8.
See Trial, 1, 4–8, 12, 13, 18–20.

INTENT.

See Parent and Child, 6.
See Statutes, 4.
See Wills, 3.

INTOXICATING LIQUORS.

Intoxicating Liquors—Sale—Indictment—Sufficiency.

1. Indictment under Laws of 1917, page 46, Section 1, amending Section 5, Laws of 1915, page 151, but leaving Sections 1–4 in full force, as to unlawful sale, etc., of intoxicants, *held* sufficient although particular liquor was not designated; such designation not being required in view of Laws of 1915, page 166, Section 33. (State v. Busick, 466.)

IRRIGATION.

See Waters and Watercourses, 3, 4.

JOINT ADVENTURES.

See Negligence, 4, 6.

JUDGMENT.

Judgment—Res Judicata—Action for Possession—Title.

1. In an action to replevin a building as personalty, where a mortgagee of the land was not made a party, mortgagee's paramount right to have the building remain on the land could not be adjudicated. (Lees v. Hobson, 248.)

Judgment—Estoppel by Judgment—Involuntary Nonsuit.

2. Where servant sued the master for injuries, involuntary nonsuit did not, in view of Section 184, L. O. L., bar subsequent action

against both the master and the foreman. (Malloy v. Marshall-Wells Hardware Co., 303.)

Judgment—Conclusiveness—Res Judicata—Matters Concluded.

3. Facts identical with those relied on as a cross-complaint in a prior suit, wherein the complaining party drew up the decree, *held* concluded between the parties. (Smith v. Boothe, 360.)

Judgment—Res Judicata—Matters Concluded.

4. A judgment upon the merits is a bar to a subsequent action between the same parties on the same claim, both as to matters that might have been as well as those that were actually litigated. (Smith v. Boothe, 360.)

Judgment—Merger—Nature of Relief.

5. Where attorneys purchased a mortgage and foreclosed, mortgagors being their clients, and court in foreclosure decree executed trust in favor of mortgagors arising from confidential relation, by setting aside deed procured by attorneys, and declaring mortgagors to be owners, subject to lien of mortgage, confidential relation of attorneys and its abuse was merged in the decree. (Smith v. Boothe, 360.)

Judgment—Finality—Motion for Dismissal—Directed Verdict.

6. While a judgment of nonsuit under Section 184, L. O. L., operates merely as a dismissal, a judgment on a directed verdict concludes the controversy. (Ridley v. Portland Taxicab Co., 529.)

Judgment—Res Judicata—Identity of Issues—Adverse Possession.

7. Decree, in suit to quiet title, that suit be dismissed because plaintiff had neither established a valid contract of sale to his predecessors nor adverse possession for 10 years, *held* no bar to plaintiff's subsequent action for possession based on subsequently acquired title by adverse possession. (Bessler v. Powder River Gold Dredging Co., 663.)

See Adverse Possession, 3.
See Appeal and Error, 1, 23.

JUDICIAL NOTICE.

See Evidence, 9.

JURISDICTION.

See Corporations, 9, 10, 12, 13.
See Insane Persons, 1.
See Railroads, 11.

JUSTICES OF THE PEACE.

Justices of the Peace—Appeal—Docket—Entry of Allowance.

1. Where the original papers are regular on their face, with the exception that the docket of the justice shows no entry of allowance of appeal, such fact does not defeat an appeal otherwise regular. (St. Helens Lumber Co. v. Evans, 71.)

Justices of the Peace—Appeal—Transcript—Certificate—"All."

2. Under Section 2463, L. O. L., providing that transcript on appeal from Justice Court shall contain copy of all material entries in

justice's docket, certificate stating transcript contained all entries is sufficient "all" including restrictive term "material." (St. Helens Lumber Co. v. Evans, 71.)

LABOR.

See Work and Labor.

LANDLORD AND TENANT.

Landlord and Tenant—Lease—Misrepresentation—Estoppel.

1. After lessee had personally investigated premises before delivery of lease, and had for six years complied with all the provisions of the lease without complaint, and then upon assigning it had received in consideration property equal to what he had paid thereunder, he could not claim that he was induced to enter lease by misrepresentation or deception. (Houston v. Barnett, 94.)

Landlord and Tenant—Assignment—Liability of Assignor.

2. Lessee who assigns lease continues liable on the covenants to pay rent and taxes which accrue subsequent to the assignment. (Houston v. Barnett, 94.)

Landlord and Tenant—Lease—Assignment—Liability of Assignee.

3. Assignee of a leasehold is personally liable for rent accruing while he retains the leasehold. (Houston v. Barnett, 94.)

Landlord and Tenant—Landlord's Lien—Crops of Subsequent Years.

4. Where landlord, by express provision of lease, is given lien upon crops as security for rent, the lien is effectual, not only as regards the crops of the first year, but also as to those raised during subsequent years; the lien attaching when crop is planted. (La Grande Nat. Bank v. Oliver, 115.)

See Fixtures, 1.

LARCENY.

Larceny—Evidence—Ownership.

1. In a prosecution for larceny of a horse, a chattel mortgage given by a witness for the purchase price of horses, not including the one in question, *held* irrelevant on the question of ownership of the horse stolen. (State v. Morris, 60.)

Larceny—Evidence—Ownership.

2. In a prosecution for larceny of a horse, defendant could not prove ownership of the animal by showing that he had mortgaged it or that he had been sued by an outside party for its possession. (State v. Morris, 60.)

Larceny—Evidence—Identity—Admissibility.

3. In a prosecution for cattle theft, where it appeared that defendant rode a gray horse, *held*, under the circumstances, that witnesses who lived where they would probably have seen defendant going to the corral of the prosecuting witness might testify they saw two men riding gray horses, though they did not recognize them. (State v. Stickel, 415.)

LEASE.

See Executors and Administrators, 1.
See Landlord and Tenant, 1–3.
See Specific Performance, 1.

LEGAL CONCLUSION.

See Pleading, 2.

LEVY.

See Attachment, 1, 2.

LIABILITY.

See Execution, 2.
See Landlord and Tenant, 2, 3.
See Master and Servant, 10, 16, 18, 19.
See Principal and Agent, 4–6.
See Sheriffs and Constables, 1, 2.

LIENS.

See Landlord and Tenant, 4.
See Logs and Logging, 1, 2.
See Mechanics' Liens, 1–4.
See Mortgages, 2.
See Parties, 1.
See Trusts, 1.

LOGS AND LOGGING.

Logs and Logging—General Denial—Matters Provable.

1. In an action to foreclose a lien on logs for services, defendant could not, under a general denial, show that plaintiff had become a member in a partnership which previously had agreed to save defendant harmless from labor liens; a general denial giving plaintiff no notice of such a defense. (Wisdom v. Arnold, 601.)

Logs and Logging—Foreclosure of Liens—Evidence—Sufficiency.

2. In an action to foreclose a lien on logs for services, evidence *held* not to sustain a finding that plaintiff had become a member in a partnership which had agreed to save defendant harmless from labor liens. (Wisdom v. Arnold, 601.)

LOOK AND LISTEN.

See Railroads, 2–5.

MACHINERY.

See Master and Servant, 3, 5, 6, 12.

MASTER AND SERVANT.

Master and Servant—Action for Wages Due—Attorney's Fee.

1. Under Laws of 1907, page 313 (Sections 5066–5068, L. O. L.), an employee who has been discharged is not entitled to allowance of attorney's fees; the proviso in Section 3 of the act contemplating payment of attorney's fees only where employee has quit after giving three days' notice of intent to quit. (Olson v. Heisen, 176.)

Master and Servant — Injuries to Servant — Negligence—Safety Devices—Evidence.

2. In an action by a servant for personal injuries alleged to have been caused by the dangerous condition of the master's hatchway, evidence that a similar hatchway was provided with a cleat, *held* admissible to show that it was practicable to use such safety devices. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant — Injuries to Servant — Machinery—Safety Devices—Evidence.

3. In an action by a servant for injuries sustained, alleged due to master's failure to safeguard a hatchway, evidence that after plaintiff's injury the master placed a railing around the hatchway was admissible to show that such a railing was practicable. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Negligence — Dangerous Premises — Control of Leased Property—Evidence.

4. Evidence *held* ample to entitle the jury to infer from tenant's enlargement of a hatchway and continued use thereof that it had such control thereof that it could inclose and otherwise safeguard the hatchway. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injury to Servant—"Machinery."

5. A block and tackle used for hoisting things through a hatchway constitutes "machinery," within the meaning of the Employers' Liability Act (Laws 1911, p. 16). (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Dangerous Machinery—Duty—Use.

6. Although the master is a merchant leasing and using a barn, in so far as it operates machinery therein it comes within Laws of 1911, page 16, requiring floor openings and similar dangerous places to be inclosed, notwithstanding they may be used only 10 or 12 times a year. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant — Injuries to Servant — Dangerous Premises — Hatchway.

7. Evidence *held* to justify the jury in finding that it was practicable for the master to have installed a guard-railing around a hatchway in its barn; failure to do which caused injury to plaintiff. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries—Care—Delegation of Duty.

8. The master's duty under Laws of 1911, page 16, to construct a guard-rail around a hatchway to protect its servants is absolute and nondelegable, and would remain obligatory on the master, even if it had ordered its servant, plaintiff, to construct the guard-rail. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Scope of Employment—Servant Working for Himself.

9. A servant employed to work in and living in his master's barn, and injured while hoisting wood therein for his own use, was not a trespasser, and was justified in using facilities at hand; and where his injury was chargeable in part to the master's violation of law

in leaving a hatchway without a safeguard, the master is liable. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant — Injuries to Servant — Actions — Liability of Foreman.

10. Where a servant was injured on the master's premises while working for himself, and not under the direction of the master's foreman, the foreman would not be liable, under Laws of 1911, page 17, section 3, for failure to install safety devices as required. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Actions—Manner of Doing Work.

11. Those provisions of the Employers' Liability Act, defining the manner of doing certain work, are inapplicable to the case of a servant injured through the breaking of his master's rope while engaged in working for himself, and the master's foreman was not required to test the rope selected by plaintiff. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Instructions—Inspection of Machinery.

12. An instruction that the Employers' Liability Act applied to the manner of doing work, where the injured servant was working for himself with the master's machinery, and that master's foreman, who was not directing the work, was liable for failure to test a rope, was erroneous. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Instructions—Diligence of Master.

13. Instruction on the common-law liability of a master for injuries to a servant, caused from the unsafe condition of a hatchway, *held* erroneous, as exacting too high a degree of diligence. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant — Actions — Instructions—Contributory Negligence—Pleading.

14. Allegations of master's answer that whatever injuries the servant suffered were the result of his own acts, and that any negligence involved was that of the servant, were sufficient to justify the court in instructing on contributory negligence. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Course of Employment—Questions for Jury.

15. Where servant set up master's contract to supply fuel wood, and alleged injuries while hoisting wood to his own quarters, whether the foreman's ordering other servants to haul wood to plaintiff's place of work constituted a recognition of such alleged agreement, and whether the wood belonged to plaintiff and not to the master, *held* for the jury. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant — Employers' Liability Act—Construction—Liability of Foreman.

16. The Employers' Liability Act extends liability to foremen, in view of Section 3 thereof, making the foreman criminally liable for neglect of duty. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Injuries to Servant—Actions—Defenses Available to Foreman.

17. Under the Employers' Liability Act, though the foreman may be criminally liable for neglect of duty, the defense of contributory negligence is open to him in a civil action notwithstanding it is withdrawn from the employer. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant—Employers' Lability Act—Criminal and Civil Liability of Foreman.

18. The Employers' Liability Act, Section 3, making the foreman criminally liable for neglect of duty, and providing that such punishment shall not affect his civil liability, neither enlarges nor lessens the foreman's civil liability. (Malloy v. Marshall-Wells Hardware Co., 303.)

Master and Servant — Liability for Acts of Servant — Direction of Verdict.

19. Ownership of an automobile operated by an agent constitutes a *prima facie* case for the jury of the principal's liability for injuries inflicted by the agent in driving the machine of which he had general charge, although for a purpose of his own, in view of Section 796, L. O. L., authorizing an inference of fact to the be founded on the "course of business." (Doherty v. Hazelwood Company, 475.)

Master and Servant—Injuries to Servant—Evidence—Jury Question.

20. In an action by a taxicab driver, who claimed to have suffered injuries as a result of defective wrench furnished by the employer to enable drivers to replace punctured tires, evidence *held* sufficient to carry the case to the jury. (Ridley v. Portland Taxicab Co., 529.)

Master and Servant—Injuries to Servant—Workmen's Compensation.

21. Cause of action by a taxicab driver for injuries received as a result of a defective wrench furnished by the employer to remove punctured tires, etc., does not fall within the Employers' Liability Act. (Ridley v. Portland Taxicab Co., 529.)

Master and Servant—Loss of Property—Evidence.

22. In action for loss of property by railroad's foreman of section gang when his outfit train was run into by another, complaint being that railroad's negligence resulted in destruction or theft of plaintiff's property, court properly refused to allow plaintiff to show that after collision he demanded his property from railroad's claim agent. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Master and Servant—Injuries—Pleading and Proof.

23. In action for injuries and loss of property by railroad's foreman of section gang in collision between his outfit train and a freight, as against general charges of negligence, railroad was entitled to show condition of brakes of freight and care it took to equip with such means of stopping. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Master and Servant—Injury to Servant—Pleading—Rules of Employment.

24. Where rules of employing company required a certain line of conduct, and injured servant's pleading shows a violation of such

rules, their text may be shown in connection with conduct involved which is declared to be an infraction of them. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

MECHANICS' LIENS.

Mechanics' Liens—Claim—Validity of Lien—Bookkeeping Errors.

1. Bookkeeping errors resulting in a delivery of more materials than was reasonably necessary to complete the building and a failure to note certain credits for materials returned, when not willful errors but honest mistakes, do not invalidate a lien. (Columbia River Door Co. v. Todd, 147.)

Mechanics' Liens—Statutes—Failure to Give Owner Statement of Materials Furnished.

2. Failure to mail or deliver statements of materials furnished to owner as required by Section 7416, L. O. L., as amended by Laws of 1915, page 224, rendered nonlienable only those items delivered after May 22, 1915, when amendment became effective; it not being retroactive. (Columbia River Door Co. v. Todd, 147.)

Mechanics' Liens—Amount of Lien—Nonlienable Items.

3. Though some of the items of materials furnished were nonlienable, the subcontractor is entitled to a lien for the lienable items after deducting the credits for returned materials. (Columbia River Door Co. v. Todd, 147.)

Mechanics' Liens—Attorney's Fee—Lack of Evidence.

4. In mechanic's lien foreclosure action where there was no evidence as to whether $300 was a reasonable amount to be allowed as attorney's fees, plaintiff's allegation that such sum was reasonable being denied no allowance can be made. (Columbia River Door Co. v. Todd, 147.)

Mechanics' Liens—Sufficiency of Claim and Complaint.

5. A claim of lien for extra material and labor, and complaint, in an action to enforce a lien, must show that the material and labor was furnished for the structure in question. (Hoskins v. Powder Land & Irr. Co., 217.)

Mechanics' Liens—Extra Work.

6. Extra work done by a contractor on a dam, consisting of clearing out borrow-pits, and work on a county road a mile from the dam, cannot be made a lien on the dam. (Hoskins v. Powder Land & Irr. Co., 217.)

MEDICAL TESTIMONY.

See Evidence, 5.

MERGER.

See Judgment, 5.

MISREPRESENTATION.

See Fraud, 8.
See Landlord and Tenant, 1.

MISTAKE.

See Compromise and Settlement, 3.
See Reformation of Instruments, 1, 3.

MODIFICATION.

See Contracts, 6, 11.

MORTGAGES.

Mortgages—Invalidity as Between Parties—Mortgage to Self.

1. Mortgage from holder of bare legal title to real and equitable owner as between parties was void, as being equitably a mortgage from equitable owner to himself. (Lombard v. Bietau, 182.)

Mortgages—Mortgage to Self—Lien—Assignment.

2. Mortgage made to a real equitable owner of property by his own agent and for his own purposes gave him no lien on property; neither could any assignment thereof convey equitable right to any but innocent purchaser, who can have benefit of it only to extent of claim. (Lombard v. Bietau, 182.)

Mortgages—Construction.

3. A note and a mortgage given to secure it will be construed together as one instrument. (Temple v. Harrington, 295.)

Mortgages—Title.

4. A mortgage conveys no title, the title remaining in mortgagor. (Beakey v. Knutson, 574.)

Mortgages—"Consideration"—Prior Renewal of Another's Debt.

5. A past renewal of the debt of another is not the necessary "consideration," a benefit to the party promising or a loss or detriment to the party to whom the promise is made, for mortgage to secure such debt. (Bryson v. Day, 619.)

Mortgages—Consideration—Pleading and Evidence.

6. Evidence that defendant, in suit to foreclose mortgage to secure the prior debt of another, was practically the sole stockholder of such other, is not available to show consideration; the complaint not alleging such relation. (Bryson v. Day, 619.)

See Corporations, 5.

MOTION.

Overruling Motion for Nonsuit.

See Appeal and Error, 20.

Motion for Dismissal.

See Judgment, 6.

Motion to Strike.

See Pleading, 10.

Motion for Nonsuit.

See Trial, 14.

Motion for Directed Verdict.

See Trial, 15–17.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Trespass—Electric and Waterworks.

1. In the construction and operation of electric and waterworks for profit, the city occupies the same position as a private corporation, organized to buy or sell and get gain, and in the same manner as an individual it is liable, both at law and in equity, for its trespass upon and violation of individual rights. (Stephens v. City of Eugene, 167.)

Municipal Corporations—Use of Streets—Injuries—Negligence and Proximate Cause—Questions for Jury.

2. In an action for injuries to five-year old boy, struck by automobile in crossing street, whether defendant was negligent, and whether such negligence was proximate cause of injuries, *held* for jury. (Ahonen v. Hryszko, 451.)

Municipal Corporations — Injuries from Automobile — Contributory Negligence—Question for Jury.

3. In action for injuries to five-year old boy when struck by automobile in crossing street, whether child's acts constituted contributory negligence *held* for jury. (Ahonen v. Hryszko, 451.)

Municipal Corporations—Injuries by Automobile—Negligence.

4. Mere fact that automobile driver keeps within statutory speed limit does not absolve him from charge of negligence in striking child, who attempts to cross street before him. (Ahonen v. Hryszko, 451.)

Municipal Corporations — Commissionership — Election to Fill Unexpired Term—Charter.

5. Under Charter of City of Portland, sections 21, 30, 64, 123, commissioner appointed July 2, 1917, to fill vacancy by resignation in four-year commissionership lasting until June 30, 1919, *held* not entitled to office as against commissioner elected "at the next general municipal election," November 5, 1918, date set by Article II, Section 14–a, of the Constitution, adopted June 4, 1917, charter contemplating election to fill unexpired term. (State ex rel. v. Kellaher, 538.)

Municipal Corporations—Sidewalks—Constructive Notice.

6. Notice to a city of a dangerous condition of its sidewalks may be implied if the defect has existed for such a length of time that the municipal authorities, by the exercise of reasonable care, could have known of its existence and remedied it. (Cartano v. City of Athena, 586.)

Municipal Corporations—Defective Sidewalk—Notice—Jury Question.

7. In an action for injuries which plaintiff received as the result of a fall occasioned by a defect in the sidewalk, the question as to whether the city had constructive notice of the defect, *held*, under the evidence, for the jury. (Cartano v. City of Athena, 586.)

Municipal Corporations—Sidewalks—Contributory Negligence.

8. Whether plaintiff, who was injured by a fall when he stepped into a hole in the sidewalk on a dark night, was negligent, *held*, under the evidence, for the jury. (Cartano v. City of Athena, 586.)

MUTUALITY.

See Reformation of Instruments, 1.

MUTUAL WATER COMPANIES.

See Execution, 7.

NAVIGABLE WATERS.

Navigable Waters—"Navigable Stream"—Common Law.

1. At common law all streams on which the tide ebbed and flowed were *prima facie* "navigable," and all other streams were held to be private or unnavigable. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Navigability—Test.

2. The test of navigability which is applied in most of the jurisdictions in the United States, including the Supreme Court of the United States, is navigability in fact. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Classes.

3. Streams and bodies of water as regards navigability are divided into several distinct classes: (1) Those in which the tide ebbs and flows; (2) those which are navigable in fact for boats, vessels, or lighters; (3) streams not navigable for any purpose; and (4) the larger rivers susceptible of a great volume of commerce. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Capacity for Floatage.

4. A stream capable in its natural state of floating sawlogs to market successfully is navigable for that purpose. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Riparian Owners—Right to Water.

5. Conceding that title to bed of stream which is navigable in fact is in riparian owners, they do not own the water itself, but only the use of it as it flows by their property. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—"Navigability"—Test.

6. The test of navigability of a stream is its capacity to afford the length, width, and depth which enables boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—"Commerce"—Pleasure Boats.

7. A vessel carrying a load of passengers to a picnic is in law as much engaged in "commerce" as one carrying grain or other merchandise. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—"Navigable Stream."

8. A stream having well-defined banks, a well-defined channel, and a fairly constant depth of water sufficient to enable small boats and scows capable of conveying cattle, hay and other products to

traverse its waters at all seasons, possesses a qualified navigability. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Navigability—Evidence.

9. In suit to enjoin defendant riparian owner from obstructing the outlet of a stream having a qualified navigability, up to his property, but not beyond, by dam or otherwise, *held*, that plaintiffs have the right to navigate the stream down to and across lands of defendant under water, but that the dam is practically the limit of such navigation. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Use of Shore.

10. Those using a stream having a qualified navigability have no right to land on the premises of a riparian owner without his permission. (Guilliams v. Beaver Lake Club, 13.)

Navigable Waters—Right to Divert Channel.

11. Although it was necessary that defendant be permitted to build proposed dam to protect its land from erosion, it may be enjoined from placing any obstruction in non-navigable stream until it constructs a channel of sufficient capacity to carry off the water to the same extent as the natural channel. (Guilliams v. Beaver Lake Club, 13.)

NEGLIGENCE.

Negligence—Dangerous Premises—Jury Question.

1. In an action for personal injury, caused by defendant's alleged negligence in not sufficiently guarding a path used by the public for many years, next to which defendant had made a deep and dangerous excavation, evidence *held* sufficient to take the case to the jury. (Boulby v. Columbia Contract Co., 274.)

Negligence—Imputed Negligence—Driver and Occupant of Vehicle.

2. Whether automobile passenger was a guest, or was in partial control of the car, which was negligently driven upon the track and struck by a train, *held* for the jury. (Robison v. Oregon-Wash R. & N. Co., 490.)

Negligence—Imputed Negligence—Guest in Vehicle.

3. Negligence of the driver of an automobile is not to be imputed to a mere guest. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Negligence—Imputed Negligence—Joint Adventure.

4. Negligence of the driver of an automobile, who negligently goes upon a railroad track, is to be imputed to one riding with him, who is his master or principal, in control of the machine, or if the passenger and the driver are engaged in a joint adventure, in which the transportation is a factor. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Negligence—Imputed Negligence—Jury Question.

5. Whether deceased automobile driver and injured passenger were engaged in joint adventure, *held*, under the evidence for the jury. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Negligence—Imputed Negligence—Joint Adventure—Requisites.

6. To establish a joint adventure between automobile driver and passenger, the passenger must have either express or implied right to direct the movement of the car. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Negligence—Imputed Negligence—Exercise of Care by Plaintiff.

7. Assuming that an automobile passenger was a mere guest, negligence of the driver could not be imputed to him, if he was in the exercise of reasonable care under all circumstances. (Robison v. Oregon-Wash R. & N. Co., 490.)

See Highways, 3.
See Master and Servant, 2, 4, 14.
See Municipal Corporations, 2–4.
See Railroads, 10.

NEW TRIAL.

New Trial—Verdict—Nonconformity to Pleadings.

1. In action to recover $330 remaining unpaid on stock subscription, wherein defendant pleads fraud and demands judgment for $265 as damages sustained, a verdict for plaintiff for $1 was properly set aside by the trial court, being an impossible verdict under the pleadings. (British Empire Ins. Co. v. Hasenmayer, 608.)

Sufficiency of Grounds for Motion.

See Criminal Law, 5.

NONSUIT.

See Appeal and Error, 20.

NONSUPPORT.

See Parent and Child, 1–11.

NOTICE.

See Appeal and Error, 11–13.
See Fraud, 6, 7.
See Municipal Corporations, 6, 7.
See Sales, 11.
See Vendor and Purchaser, 1, 2.

NUNC PRO TUNC.

See Appeal and Error, 24.

OFFICERS.

See Waters and Watercourses, 4.

OPINION.

As to Signatures on Checks.

See Criminal Law, 21.

Weight of Opinion Evidence.

See Evidence, 3.

When Representations are not Actionable Fraud.
See Fraud, 8.

As to Worth of Property.
See Fraud, 9.

OREGON CASES.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.
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OREGON CONSTITUTION.

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OREGON STATUTES.

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OWNERSHIP.

See Animals, 1, 4.
See Evidence, 4.
See Larceny, 1, 2.

PARENT AND CHILD.

Parent and Child—Nonsupport of Child—Statutes.

1. Statutes such as Laws of 1917, page 175, amending Laws of 1913, page 472, as amended by Laws of 1915, page 359, which make it an offense for a person without just or sufficient cause to fail to support his children, are intended to compel a father when able to do his full duty, but do not define the duty of a father. (State v. Langford, 251.)

Parent and Child—Support—Father.

2. It is the legal duty of a father to support his child in accordance with his ability and circumstances, etc. (State v. Langford, 251.)

Parent and Child—Duty to Support.

3. The primary obligation on the part of the father to support his child is not taken away by Section 7039, L. O. L., etc., relating to the duty of both parents to maintain their children. (State v. Langford, 251.)

Parent and Child—Support—Obligation.

4. The duty to support offspring is a continuing obligation. (State v. Langford, 251.)

Parent and Child—Support—Statute.

5. In a prosecution under Laws of 1917, page 175, making it an offense for any person without just or sufficient cause to fail to support his children, proof of a complete failure to support is not neces-

sary to conviction; proof of failure to provide adequate support being sufficient. (State v. Langford, 251.)

Parent and Child—Nonsupport—Intent.

6. A wicked intent is not an essential element of the crime of failure to support children denounced by Laws of 1917, page 175. (State v. Langford, 251.)

Parent and Child—Nonsupport—Defense—"Just"—"Just or Sufficient Cause."

7. Under Laws of 1917, page 175, denouncing the offense of failure without just or sufficient cause to support children, the expression "just or sufficient cause" means legal or lawful cause, the word "just" being derived from the Latin "justus," which is from "jus," meaning a legal right; hence, while the law does not require the impossible, the cause for failure to excuse must be lawful cause. (State v. Langford, 251.)

Parent and Child—Nonsupport—Excuse.

8. That a wife has means of her own and supports children is no defense to a prosecution against the husband under Laws of 1917, page 175, for failure, etc. (State v. Langford, 251.)

Parent and Child—Nonsupport—Excuse.

9. The remarriage of the mother of a child after divorce from the father is no defense to a prosecution against the father under Laws of 1917, page 175, for failure to support the child, as that duty does not devolve on the stepfather in the absence of a showing that he stands in *loco parentis*. (State v. Langford, 251.)

Parent and Child—Nonsupport—Defenses.

10. Where a father, after divorce from his wife, who was awarded custody of the minor child, remarried, the father is entitled, in a prosecution under Laws of 1917, page 175, making it an offense for any person without just or reasonable cause to fail to support his wife or children, to show his inability to support his second wife, etc., much less the child; the remarriage, which was lawful, having occurred before passage of Laws of 1917, at which time the father was by Laws of 1913, page 472, as amended by Laws of 1915, page 359, excepted from penalty for failure to support such child, etc. (State v. Langford, 251.)

Parent and Child—Nonsupport—Evidence.

11. In a prosecution under Laws of 1917, page 175, for failure to support his minor child of a former marriage custody of which had been awarded the mother, evidence as to the refusal of the father to support the child prior to Laws of 1917, *held* admissible on question whether his failure was without just cause, particularly as failure was no offense under law prior to time Laws of 1917 went into effect, etc. (State v. Langford, 251.)

PAROL EVIDENCE.

See Evidence, 6.

PARTIES.

Parties—Want of Capacity—Assumed Name—Waiver by Failure to Plead.

1. In action to foreclose mechanics' lien where plaintiff alleged its assignor was doing business under a certain name, defendant's failure to plead noncompliance with requirements of Laws of 1913, page 270, as to doing business under an assumed name, waived any benefit which would otherwise accrue to them because of assignor's noncompliance with the statute. (Columbia River Door Co. v. Todd, 147.)

Parties—Real Party in Interest.

2. In an action by a mortgagee to enjoin the removal of a building from land, in accordance with a decree in a replevin action between the owner and a tenant, in which sureties on the bond on appeal of a defeated party in the replevin action are made defendants, such defendants, and not plaintiff, are parties in interest, and plaintiff cannot enjoin defendants from enforcing execution against the sureties, under Section 392, L. O. L.; such sureties not appearing or asking for any relief. (Lees v. Hobson, 248.)

PAYMENT.

Payment With Notice of Fraud.

See Fraud, 6, 7.
See Vendor and Purchaser, 1, 2.

PERSONAL INJURIES.

See Appeal and Error, 21–24, 26.
See Damages, 1.
See Evidence, 5, 8.
See Master and Servant, 2–24.
See Municipal Corporations, 2–4.
See Pleading, 8.
See Trial, 8–10, 18–20.

PLAT.

Acquisition of Title to Land in Plat.

See Deeds, 1.

Correction of Original Plat.

See Estoppel, 1.

PLEADING.

Pleading—Variance—Recovery for Tort on Pleading Contract.

1. Where complaint is based upon a right of action *ex contractu*, plaintiff cannot recover upon proof of a right of action *ex delicto*. (Johnson v. Stillwell, 211.)

Pleading—Legal Conclusion.

2. In an action for breach of contract to care for livestock, allegation that defendant negligently violated the terms of his agreement was a legal conclusion. (Johnson v. Stillwell, 211.)

Pleading—Equitable Suits—Demurrer.

3. Section 68, L. O. L., enumerating grounds of demurrer to a complaint, and Section 71, providing that such objections may be taken by answer, when not appearing on the face of the complaint, are applicable to suits in equity, in view of the express provisions of Section 395. (Beneke v. Tucker, 230.)

Pleading—Conclusion of Law.

4. The pleading of a conclusion of law, if demurred to, amounts to a nullity. (Dickenson v. Henderson, 408.)

Pleading—Conclusion of Law—Insanity.

5. The plea that a person is insane and incapable of conducting his own affairs is not a conclusion of law, but of fact. (Dickenson v. Henderson, 408.)

Pleading—Reply—Departure from Complaint.

6. In action by buyer to recover what he had paid on contract wrongfully rescinded by seller, buyer's reply to seller's answer setting up rescission, denying that time was of the essence, and alleging the seller wrongfully renounced and abandoned, was not a departure from complaint. (Massey v. Becker, 461.)

Pleading—General Issue—Matters Provable.

7. Under the general issue, evidence may be given of anything that would simply disprove the allegation controverted. (Wisdom v. Arnold, 601.)

Pleading—Trial—Conclusion of Law—Instruction.

8. Allegation, in complaint of railroad's foreman of section gang suing for personal injury and loss of goods in collision between his outfit train and a freight, that while outfit train was standing, railroad in violation of its rules failed to stop freight was a mere conclusion of law, not calling for instruction in respect to violation of rules. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Pleading—Amendment—Changing Cause of Action.

9. Amendment of complaint in action to enforce contract for transfer of liens *held* not open to objection of changing cause of action. (Aya v. Morson, 647.)

Pleading—Motion to Strike—Admission of Allegations.

10. Motion to strike paragraphs of plaintiff's reply admitted the truth of their allegations for purpose of determining whether the motion was properly granted. (Bessler v. Powder River Gold Dredging Co., 663.)

See Abatement and Revival, 1.
See Courts, 1.
See Highways, 2.
See Insane Persons, 1.
See Logs and Logging, 1, 2.
See Master and Servant, 14.
See Mortgages, 6.
See New Trial, 1.
See Principal and Agent, 3, 6.
See Trial, 16, 17, 19.

PORTLAND, CHARTER OF.
See State ex rel. v. Kellaher, 538.

POSSESSION.
Continuity of Possession.
See Adverse Possession, 2, 3.

Action to Replevin a Building.
See Judgment, 1.

Title and Right to Possession.
See Replevin, 1.

Sale of Personalty, Necessity for Change of Possession.
See Statute of Frauds, 3.

To Maintain Trespass.
See Trespass, 1, 2.

PREFERRED STOCK.
See Corporations, 1, 3.

PRESUMPTIONS.
See Appeal and Error, 3, 4.
See Compromise and Settlement, 2.
See Contracts, 4.
See Deeds, 1.
See Evidence, 2, 7.

As to Laws of Sister State.
See Evidence, 9.

That Official Duty has Been Regularly Performed.
See Evidence, 10.

PRINCIPAL AND AGENT.
Principal and Agent—Relation—Question for Jury.
1. In action for breach of contract to deliver sheep, whether the person executing the contract for defendant was authorized to do so, or whether his act was ratified by defendant, *held* for the jury. (Hinton v. Roethler, 440.)

Principal and Agent—Relation—Proof.
2. Agency may be proved by the testimony of the alleged agent. (Hinton v. Roethler, 440.)

Principal and Agent—Pleading and Issues.
3. Under an allegation that defendant agreed to sell 400 head of sheep, plaintiffs could prove that the agreement was made by defendant in person, or by his authorized agent, or by one whose acts, though not previously authorized, were afterward ratified. (Hinton v. Roethler, 440.)

Principal and Agent—Liability of Principal.

4. A person is not liable on a contract executed by another in his behalf, unless he previously authorized or subsequently ratified the act. (Hinton v. Roethler, 440.)

Principal and Agent—Liability of Agent.

5. Where one holds himself out as an agent and executes a contract in behalf of another, he is liable on an implied warranty that he is an authorized agent, where he was neither previously authorized nor the act afterwards ratified. (Hinton v. Roethler, 440.)

Principal and Agent—Liability of Agent—Pleading.

6. In a plain action on a contract, recovery cannot be had against one of two defendants on the ground that he falsely held himself out as the authorized agent of the other defendant. (Hinton v. Roethler, 440.)

PROCESS.

See Summons.

PROPERTY.

Subject to Levy.
See Execution, 3–7.

PROXIMATE CAUSE.

See Municipal Corporations, 2.

PUBLIC INTERESTS.

See Execution, 6.

PUBLIC SERVICE COMMISSION.

See Railroads, 11.

PURCHASE-MONEY MORTGAGES.

See Dower, 1.

QUESTION FOR JURY.

See Criminal Law, 2.
See Master and Servant, 15, 20.
See Municipal Corporations, 2, 3, 7.
See Negligence, 1, 5.
See Principal and Agent, 1.
See Statute of Frauds, 2.

QUIET TITLE.

See Adverse Possession, 1–3.

RAILROADS.

Railroads — Crossing Accidents — Respective Duties of Railroad and Traveler.

1. The duty of the traveler to use reasonable diligence to avoid a collision at a crossing is as imperative as the duty of those who

operate the train, with the qualification that the train has the right of way where the track intersects the highway. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Automobiles—Care Required.

2. An automobile being capable of control within narrow limits, the driver of an automobile, on approaching railroad crossing, must observe more particularly the rule to look and listen than must a driver of a team. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Duty to Look.

3. Failure of a person, about to cross a railway track on a highway at grade, to look and listen for an approaching train, is negligence *per se*, and will bar a recovery for an injury received by a collision with a train at the crossing. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Duty to Look and Listen.

4. It is incumbent on an automobile driver, approaching a railroad crossing, both to look and to listen. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Duty to Look and Listen.

5. Where view of railroad track from road was obstructed by bluff, it was the duty of an automobile driver to look for a train before going on the track. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accident—Contributory Negligence.

6. Driver of automobile, who approached railroad crossing at about 6 miles per hour without looking or listening, was guilty of contributory negligence when he failed to stop, if necessary in order to see approaching train, before going on track, and was killed by a train. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads — Crossing Accidents — Automobile Passenger—Rights and Duties.

7. Though passenger in automobile was merely a guest, it was his duty on approaching a railway crossing, to look and listen according to his opportunity, and, if he did not, he assumed the risk. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Instructions—Generality.

8. In action for injuries and death at railroad crossing, instruction on care required *held* too general. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Respective Rights.

9. One in an automobile approaching railroad track cannot assume that the employees of the railroad have performed their duty until after he has effectively looked and listened without seeing or hearing an approaching train. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Crossing Accidents—Speed of Train.

10. No rate of speed over a country crossing infrequently traveled is of itself negligence on the part of the railroad. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Railroads—Public Service Commission—Jurisdiction—Construction of New Highway.

11. Where a railroad company appropriated part of a county road for its right of way, under a contract with the County Court to establish another road, but the company failed to carry out its agreement, *held* that, under Laws of 1913, page 577, Section 1, the Public Service Commission was without jurisdiction to order the railroad company to construct a highway in lieu of the one appropriated. (In re County Road No. 65, 519.)

RATIFICATION.

See Waters and Watercourses, 4.

RECORD.

See Appeal and Error, 4, 16, 19.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments—Mistake—Mutuality.

1. A mistake, as in a deed, must be mutual, or a court of equity will not grant relief. (Miller v. Fisher, 111.)

Reformation of Instruments—Burden of Proof.

2. In suit to reform contract for mutual mistake, plaintiff has burden to show mistake and its mutuality. (Miller v. Fisher, 111.)

Reformation of Instruments—Mutual Mistake as to Land Reserved.

3. Where defendant, when he purchased interest of vendee's assignee in contract for purchase of land, knew that written contract had been modified by oral agreement so as to reserve a bridge and additional land as part of roadway specified therein, and thereafter a written contract was entered into between him and the vendors which, because of mutual mistake, failed to reserve the bridge and additional land, vendors were entitled to reformation. (Heltzel v. Baird, 156.)

REMOVAL OF CAUSES.

Removal of Causes—Diverse Citizenship—Time of Filing Petition.

1. Under Act Cong. Aug. 13, 1888, Chapter 866 (25 Stat. 435), providing that petition for removal of causes to federal court, based on diversity of citizenship, must be filed before the defendant is required by law or rule of the state court to answer, the time of filing petition expires on such date, notwithstanding the time to answer may have been extended, by stipulation or court order. (Malloy v. Marshall-Wells Hardware Co., 303.)

Removal of Causes—Denial of Second Motion After Remand.

2. Where a cause was removed to federal court upon first petition therefor, asserting diversity of citizenship, and was remanded to the state court, the state court correctly denied a second petition, which was simply an enlarged edition of the first in deference to the order of the federal court. (Malloy v. Marshall-Wells Hardware Co., 303.)

REPLEVIN.

Replevin—Title and Right to Possession.

1. To maintain replevin, plaintiff must show title and right to possession. (Brown v. Sheedy, 74.)

Replevin—Answer and Evidence—Fraudulent Conveyance.

2. Defendant, in replevin by P., under answer merely denying plaintiff's ownership and justifying detention of the property by virtue of attachment levied by him as sheriff on the property as that of G., cannot show any conveyance by G. to P. was in fraud of creditors. (Palmer-Haworth Logging Co. v. Henderson, 192.)

See Judgment, 1.

RESCISSION.

See Fraud, 4.
See Sales, 9, 11–14.
See Vendor and Purchaser, 1, 3, 9.

RES GESTAE.

See Evidence, 8.

RES JUDICATA.

See Divorce, 1.
See Judgment, 1, 3, 4, 7.

REVIEW.

See Appeal and Error, 7, 17, 21.
See Criminal Law, 2, 3.
See Divorce, 6.

RIPARIAN OWNERS.

See Eminent Domain, 1, 2.
See Navigable Waters, 5.
See Waters and Watercourses, 1.

ROBBERY.

Robbery—Identity of Property—Sufficiency of Evidence.

1. In a prosecution for robbery, evidence *held* sufficient to prove existence and identity of note described in indictment as taken from prosecuting witness. (State v. Bailey, 627.)

Robbery—Sufficiency of Evidence.

2. In a prosecution for robbery, evidence *held* sufficient to show that property was taken from prosecuting witness by force or intimidation and against his will. (State v. Bailey, 627.)

Robbery—Evidence.

3. In robbery case, where defendant was charged with taking a note from prosecuting witness, defendant denying that there was any note, the state was entitled to show that the note described in the indictment was placed in the hands of a bank for collection. (State v. Bailey, 627.)

SALES.

Sales—Title—Executory Contract.

1. Title does not pass while contract of sale is executory. (Brown v. Sheedy, 74.)

Sales—Breach of Executory Contract—Remedy.

2. The remedy for breach of executory contract of sale is an action for damages, not replevin. (Brown v. Sheedy, 74.)

Sales—Executory Contract.

3. Where money for cattle was to be paid at time of delivery, payment and delivery were concurrent conditions, performance of which was necessary to make contract fully executed. (Brown v. Sheedy, 74.)

Sales—Conditional Sales—Validity.

4. Conditional sales are valid and binding obligations. (Miles v. Sabin, 129.)

Sales—"Conditional Sales"—"Bailment."

5. The main distinction between a "bailment" and a "conditional sale" is that in a conditional sale there is a promise or agreement to pay, and in a bailment there is no such promise or agreement. (Miles v. Sabin, 129.)

Sales—Conditional Sale—Construction of Contract.

6. Contract between manufacturer and implement dealer, providing "that the terms and conditions of sale apply to all goods which may be ordered," that "nothing in this contract shall release the party from paying the agreed price," and that any notes held by manufacturer should continue to be valid obligations, but that manufacturer should have option to take possession of unsold goods at termination of contract, was a conditional sale contract, and not a contract making implement dealer bailee of manufacturer. (Miles v. Sabin, 129.)

Sales—Validity—Consideration.

7. It does not invalidate sale of assets of business that consideration thereof shall be paying of all debts of business; and that a limit is placed upon such amount makes no difference. (St. Helens Quarry Co. v. F. T. Crowe & Co., 284.)

Sales—Issues—Contract.

8. In an action on a certain written contract to deliver sheep, executed by A. on behalf of R., recovery cannot be had from A., who subsequently, on R.'s failure to deliver, agreed to procure other sheep for plaintiff on the same terms; A.'s agreement being a new contract. (Hinton v. Roethler, 440.)

Sales—Rescission by Seller—Action for Money Paid by Buyer.

9. When a seller abandons his contract to sell, the buyer, in his choice of remedies, may elect to rescind the contract and maintain an action at law to recover what he has paid thereon as money had and received. (Massey v. Becker, 461.)

Sales — Payment in Installments — Acceptance of Payments After Default—Election.

10. Where contract of sale provides for payments in installments, and stipulates that for default as to any the seller shall have the right to declare forfeited all payments made, acceptance of payment by seller after buyer is in default is waiver of right to declare forfeiture and election to consider contract in force. (Massey v. Becker, 461.)

Sales—Notice of Rescission by Seller.

11. Where contract of sale provides for payment in installments and stipulates that for default as to any the seller shall have the right to declare forfeited all payments made, the seller has no right to forfeit except after notice and allowance of reasonable time to comply with the contract. (Massey v. Becker, 461.)

Sales—Wrongful Rescission by Seller—Assent by Buyer—Effect.

12. When seller wrongfully attempted to rescind, having elected by acceptance of a payment after buyer's default to consider contract still in force, buyer had the right to assent to such rescission, thereby accomplishing it by mutual consent. (Massey v. Becker, 461.)

Sales—Rescission by Agreement—Restoration of Status Quo—Recovery by Buyer.

13. Where buyer and seller both consented to rescission, neither can base claim thereon except in so far as it is necessary to restoration of the *status quo;* rescission by mutual agreement ending contract. (Massey v. Becker, 461.)

Sales—Recovery of Price by Buyer—Rescission.

14. Where sale contract is rescinded by mutual consent, the buyer may recover back what he has paid. (Massey v. Becker, 461.)

See Criminal Law, 14.
See Intoxicating Liquors, 1.
See Statutes of Frauds, 6, 7.

SETOFF AND COUNTERCLAIM.

Setoff and Counterclaim—Against Assigned Cause of Action.

1. Plaintiff corporation, which secured assignment of sums due assignor under his contract with defendant city for hauling wood, was in no better position than assignor, and defendant could counterclaim for sums collected for the city by assignor for wood sold by him, although defendant had exacted a bond from him in view of section 28, L. O. L. (Ashley & Rumelin v. Portland, 40.)

SHERIFFS AND CONSTABLES.

Sheriffs and Constables — Wrongful Execution — Liability of Officer Making Execution.

1. An officer who levies execution on property of a stranger is guilty of conversion, although levy was made in good faith, and although property was not actually taken or removed. (Sabin v. Chrisman, 85.)

Sheriffs and Constables—Conversion—Liability of Sheriff.

2. A sheriff, who levied execution upon property that had passed from defendant named in writ into the hands of his assignee for benefit of creditors, was liable for conversion of such property, although he had not removed it, and had placed it in the hands of a third party from whom he had taken receipt. (Sabin v. Chrisman, 85.)

SIDEWALKS.

See Municipal Corporations, 6–8.

SODOMY.

See Criminal Law, 1.

SPECIFIC PERFORMANCE.

Specific Performance—Lease—Arbitration Agreement.

1. Where fifteen-year lease contained an arbitration clause, which defined minimum rent and purchase price for the last five-year period, and provided how and by whom the increase should be determined, a court of equity, upon lessee's refusal to comply, has jurisdiction to ascertain rental payable during last five years, and to grant specific performance of the arbitration agreement, which was a mere incident of lease and not of the essence thereof. (Houston v. Barnett, 94.)

Specific Performance—Contract to Devise Land—Equitable Relief—Value of Improvements.

2. Where owner of land agreed to devise land to plaintiff in consideration that plaintiff and family would move upon the land and board and lodge him, and plaintiff moved upon land and made improvements thereon, but failed to give owner the comfortable home, good food, and respectful treatment contemplated by the contract, the court, in action for specific performance of the contract, although denying specific performance, will compensate plaintiff for the value of the improvements made, making such sum a lien upon the land. (Hodgson v. Curtin, Executor, 105.)

Specific Performance—Defense—Shortage in Land Sold.

3. Specific performance of contract to sell twelve acres of land will not be denied vendors because of a shortage of about one tenth or one half of an acre, where the land was not purchased for a specific purpose. (Heltzel v. Baird, 156.)

SPEED OF TRAIN.

See Evidence, 7.
See Railroads, 10.

STATUTE OF FRAUDS.

Frauds, Statute of—Acceptance and Receipt of Property—Evidence.

1. In replevin for possession of 87 head of cattle, plaintiff's title depending upon oral contract of sale, testimony *held* insufficient to show acceptance and receipt of property, or some part thereof, so as to satisfy the statute of frauds as to oral contract of sale of property at a price not less than $50. (Brown v. Sheedy, 74.)

Frauds, Statute of—Questions for Jury.

2. When there is a dispute as to the facts, it must be solved by a verdict of a jury; but when the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect. (Brown v. Sheedy, 74.)

Frauds, Statute of—Performance of Contract—Change of Possession.

3. Under statute of frauds as to sale of personalty for $50 or more, a verbal transaction is not complete or binding without some physical act sufficient to indicate to an observer a change of property in the chattel involved. (Brown v. Sheedy, 74.)

Frauds, Statute of—Land Contract—Part Performance.

4. Payment by purchaser of $140 on land contract, where purchase price was $750, was sufficient part performance to entitle purchaser to specific performance, though contract did not comply with statute of frauds. (Kemmerer v. Title & Trust Co., 137.)

Frauds, Statute of—Interest in Land—Carey Act Liens—"Real Property or Interest Therein."

5. Carey Act liens for reclaiming land are not real property or an interest therein, within Section 808, subdivision 6, L. O. L., requiring agreement for sale of such property or interest to be in writing. (Aya v. Morson, 647.)

Frauds, Statute of—Sale of Personalty—Barter.

6. A barter is within Section 808, subdivision 5, L. O. L., requiring, under certain conditions, agreement for sale of personalty to be in writing. (Aya v. Morson, 647.)

Frauds, Statute of — Performance — Sale of Personalty — Release of Obligation.

7. To take out of the statute of frauds an agreement for transfer of liens in consideration for release of agreement to deliver stock, the release must be effected by an unequivocal act. (Aya v. Morson, 647.)

STATUTES.

Statutes—"Purview."

1. The "purview" of a statute is the enacting part or body of the act, as distinguished from other parts, such as the preamble, the title, saving clauses, and provisos. (Olson v. Heisen, 176.)

Statutes—Proviso—Functions.

2. The appropriate function of a proviso is to restrain or modify the purview of a statute in which the proviso is found. (Olson v. Heisen, 176.)

Statutes—Conflict Between Purview and Proviso.

3. Since there is a conflict between a part of the purview of Laws of 1907, page 314, Section 3, and the proviso thereof appearing in the same sentence, the proviso must govern. (Olson v. Heisen, 176.)

Statutes—Construction—Legislative Intent.

4. In the construction of a statute, the paramount duty of the court is to give effect to the legislative intent; and where a statute

is re-enacted with an additional clause or proviso, the clause must not be presumed meaningless. (Malloy v. Marshall-Wells Hardware Co., 303.)

Statutes—Construction—Title.

5. The title may be looked to for the purpose of ascertaining the meaning of the act. (Malloy v. Marshall-Wells Hardware Co., 303.)

Statutes—Enactment—Initiative.

6. An act adopted by the initiative must comply with Article IV, Section 20, of the Constitution, as to subjects and titles of acts. (Malloy v. Marshall-Wells Hardware Co., 303.)

See Appeal and Error, 10.
See Corporations, 9, 10.
See Courts, 2.
See Dower, 1.
See Evidence, 1.
See Exceptions, Bill of, 2.
See Mechanics' Liens, 2.
See Parent and Child, 1, 5.
See Tables in Front of this Volume.

STOCK.

See Corporations, 1, 3, 4.

STREETS.

Use of Street.

See Municipal Corporations, 2.

SUMMONS.

See Corporations, 13.

TITLE.

See Mortgages, 4.
See Sales, 1.
See Statutes, 5.

Acquisition of Title to Land in Plat.

See Deeds, 1.

Replevin Action When Title to Building Could not be Adjudicated in.

See Judgment, 1.

Title and Right to Possession.

See Replevin, 1.

TRANSCRIPT.

See Appeal and Error, 13.
See Justices of the Peace, 2.

TRESPASS.

Trespass—Possession.

1. Either actual or constructive possession is sufficient to maintain trespass, although one of the two is necessary at the time of the trespass. (Boyer v. Anduiza, 163.)

Trespass—Possession by Lessee.

2. The possession of realty by lessee under a lease from an administrator is sufficient to maintain trespass *quare clausum fregit.* (Boyer v. Anduiza, 163.)

See Animals, 2–4.
See Municipal Corporations, 1.

TRIAL.

Trial—Contradictory Instructions.

1. Where the court charged that where vendees had lived on the land two months before taking deed or paying money, having opportunity to ascertain the nature of the soil, etc., they were bound to protect themselves from any fraud of vendor, a further instruction that defendant could not rely on such rule, if he made the fraudulent statements alleged, was contradictory and ground for reversal. (McCabe v. Kelleher, 45.)

Trial—Motion for Nonsuit.

2. A motion for judgment of nonsuit concedes the truth of every statement made in the evidence for plaintiff. (Brown v. Sheedy, 74.)

Trial—Finding of Fact—Stipulations of Counsel.

3. That counsel agree to allow the court to determine attorney's fees in a lien foreclosure case does not obviate the necessity of introducing evidence upon which the court may base a finding as to an issue of fact. (Columbia River Door Co. v. Todd, 147.)

Trial—Instructions.

4. Where plaintiff alleged two causes of action, the first being for balance under contract whereby plaintiff and defendant wintered livestock together, and the second being for breach of contract to care for cattle, instruction that plaintiff was bound by an account stated, provided there had been a settlement, being inapplicable as defense to second cause of action, and being so stated as to apply to both as a defense, was improper. (Johnson v. Stillwell, 211.)

Trial—Instructions—Contradiction.

5. Contradictory instructions are erroneous. (Malloy v. Marshall-Wells Hardware Co., 303.)

Trial—Instructions—Assuming on Trial—Evidence—Instructions.

6. Instructions that assume facts not supported by the evidence are erroneous. (Malloy v. Marshall-Wells Hardware Co., 303.)

Trial—Instructions.

7. Each instruction should be viewed in connection with the remaining instructions, and should be considered as a whole. (Hinton v. Roethler, 440.)

Trial—Instruction—Evidence.

8. In action for injuries to five-year old boy, struck by automobile while crossing street, where defendant stated he saw the child, instruction hypothesizing fact defendant did not see him was properly refused. (Ahonen v. Hryszko, 451.)

Trial—Direction of Verdict—Evidence.

9. A motion for a directed verdict must be overruled, and the question at issue must in the first instance be submitted to the jury, if there is any evidence which the jury is entitled to consider as against the moving party. (Doherty v. Hazelwood Company, 475.)

Trial—Direction of Verdict—"Prima Facie Case."

10. In view of Section 793, L. O. L., and Section 868, subsection 2, whenever it is determined that a plaintiff has made out a *prima facie* case the court has no power to withdraw case from jury despite Sections 693, 797; a *"prima facie* case" being that state of facts which entitles the party to have the case go to the jury. (Doherty v. Hazelwood Company, 475.)

Trial—Direction of Verdict—When Proper.

11. Verdict cannot be directed, if there is any evidence sufficient to be submitted to the jury on the issue involved. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Trial—Instructions—Assumption of Facts.

12. Where suits of passenger in automobile and of the driver's administrator were tried together, requested instruction that, if either driver or passenger was guilty of negligence contributing to the accident, and without which it would not have occurred, verdict should be for defendant in both cases, was erroneous, as assuming that the relation of the occupants warranted imputing negligence of one of them to the other. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Trial—Instructions—Assumption of Facts.

13. Where suits of passenger in automobile and of the driver's administrator were tried together, requested instruction that, if collision with train happened wholly without the negligence of the passenger, he could recover, though the driver was negligent, was erroneous, as assuming that the driver's negligence could not be imputed to him. (Robison v. Oregon-Wash. R. & N. Co., 490.)

Trial—Motion for Nonsuit—Effect.

14. A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for plaintiff, and the court must decide whether there would be a want of evidence to support a verdict for plaintiff, though all his evidence be assumed true. (Ridley v. Portland Taxicab Co., 529.)

Trial—Motion for Directed Verdict—Effect.

15. A motion for a directed verdict presents the same question for decision as does a motion for judgment of nonsuit, but the plaintiff is entitled to the benefit, not only of his own evidence, but to the benefit of any evidence favorable to him, though introduced by defendant. (Ridley v. Portland Taxicab Co., 529.)

Trial—Motions—Demurrer to Pleading.

16. A motion for a directed verdict, as well as a motion for an involuntary judgment of nonsuit, challenges the legal sufficiency of the evidence, and in that way performs the same function in connection with the evidence as does a demurrer to a pleading, but neither

of the motions is designed to perform the function of a demurrer to a pleading. (Ridley v. Portland Taxicab Co., 529.)

Trial—Directed Verdict—Defects in Complaint.

17. Though a complaint omits some material allegation, a motion for a directed verdict, based upon the fact of such omission, should be denied, where the objection can be cured by amendment, and plaintiff's evidence, if true, makes a case against the defendant. (Ridley v. Portland Taxicab Co., 529.)

Trial—Instructions—Repetition.

18. A requested instruction was properly refused in so far as it was covered by charge as given. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Trial—Instructions—Support by Pleadings.

19. In action for injuries and loss of property for railroad's foreman of section gang in collision between his outfit train and a freight, portion of plaintiff's requested charge *held* inapplicable, and properly refused as not supported by any charge in complaint of negligence by failure to keep lookout on freight. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Trial—Instruction—Assumption of Issuable Fact.

20. In action for injuries and loss of money by railroad's foreman of section gang when his outfit train was struck by a freight, plaintiff's requested instruction *held* erroneous because assuming that goods for which he claimed damages were rightfully on train, a point challenged by answer. (Andrew v. Oregon-Wash. R. & N. Co., 611.)

Trial—Offer of Proof—Sufficiency.

21. The allegation of the complaint and plaintiff's offer of proof that he did release, seeming to be of a present release at the time, he should have been allowed to make his proof, that it might be seen whether it actually took place, and was so accomplished as to take out of the statute of frauds an agreement for transfer of liens in consideration of release of agreement to deliver stock. (Aya v. Morson, 647.)

See Pleading, 8.

Costs on Trial After a Mistrial.

See Costs, 1.

TRUSTS.

Trusts—Landlord's Lien—Collection by Bank.

1. Where landlord placed rental notes in hands of bank for collection and deposited lease giving lien on crops, and the bank subsequently took a chattel mortgage on the crops, the bank upon receiving proceeds of sale of crops took them in trust for landlord. (La Grande Nat. Bank v. Oliver, 115.)

Trusts—Enforcement—Right of Action by Cestui Que Trust Against Trustee.

2. A suit by the beneficial owner of mining stock against the trustee holding it must be dismissed, where the answer admits the

trusteeship, the trust has not terminated by its terms, and there have been no dividends. (Haldeman v. Weeks, 201.)

Trusts—Establishment—Evidence—Must be Clear and Convincing.

3. Evidence of plaintiff's beneficial interest in notes *held* not sufficiently clear and convincing to establish a trust. (Haldeman v. Weeks, 201.)

Trusts—Sale of Trust Property—Rights of Purchaser.

4. One who pays money on a legitimate transfer of property by a trustee is not bound to see that it is rightfully applied. (Beakey v. Knutson, 574.)

See Execution, 4.
See Wills, 6.

UNDERTAKING.

Defect of Undertaking on Appeal.

See Appeal and Error, 6.

VARIANCE.

See Animals, 3.
See Pleading, 1.

VENDOR AND PURCHASER.

Vendor and Purchaser—Rescission—Fraud—Payments With Knowledge of Fraud.

1. Payments of purchase-money installments with knowledge of the fraud inducing the contract of purchase amount to ratification defeating complete rescission. (McCabe v. Kelleher, 45.)

Vendor and Purchaser — Sale of Land — Payment With Notice of Fraud—Estoppel.

2. Where grantees who were induced through fraud to purchase property made payments upon notes given grantor after discovery of fraud, estoppel did not result, where such payments did not cause grantor to change his position to his injury. (McCabe v. Kelleher, 45.)

Vendor and Purchaser — Mutual Rescission — Recovery of Purchase Price.

3. Where contract for sale of land is mutually rescinded, purchaser is entitled to recover purchase price paid. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Forfeiture of Payments.

4. Forfeiture provision in land contract may be self-executing, or may merely confer option upon vendor, in which latter event default does not of itself work a forfeiture, and vendor is entitled thereto only after a declaration of forfeiture or some equivalent act or conduct. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Forfeiture of Payments.

5. A provision in land contract for forfeiture of payments will not be construed self-executing, unless unequivocal language is used

showing plainly and clearly that such was the intention of the parties. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Forfeiture of Payments.

6. Stipulation in land contract that, upon purchaser's noncompliance, "deposit shall be forfeited as liquidated damages," is not a self-executing forfeiture clause. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Time of Payments—Waiver by Vendor.

7. Where installment land contract provided for forfeiture of payments upon purchaser's noncompliance with contract, vendor, after waiving strict compliance with terms as to time of payment, could not claim forfeiture for default in payment without notifying purchaser of its intention to claim a forfeiture unless he made payment within reasonable time. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Abandonment of Contract.

8. Under installment land contract providing for forfeiture of payments upon noncompliance with contract, letter of purchaser stating that he was unable to make further payments, and that he would have to let the land go, was an abandonment of the contract, dispensing with necessity of vendor's giving notice of termination of contract in order to claim forfeiture of payments. (Kemmerer v. Title & Trust Co., 137.)

Vendor and Purchaser—Rescission—Grounds.

9. Vendee will not be allowed to rescind because vendors are unable to convey title to one tenth or one half of an acre of a tract of about twelve acres, where land was not purchased for a specific purpose. (Heltzel v. Baird, 156.)

VERDICT.

See Criminal Law, 10, 17.
See Embezzlement, 1.

Directed Verdict.

See Judgment, 6.
See Master and Servant, 19.
See Trial, 9–11, 15–17.

WAIVER.

See Fraud, 1, 2, 6.
See Parties, 1.
See Vendor and Purchaser, 7.

WATER COMPANIES.

See Carriers, 1.

WATERS AND WATERCOURSES.

Waters and Watercourses—Rights of Riparian Owner—Accustomed Flow.

1. Riparian owner of land, abutting on both banks of a slough, is entitled to have water flow as it is naturally accustomed to flow. (Stephens v. City of Eugene, 167.)

Waters and Watercourses — Flowage — Ditches — Injunction—Injury Caused by Plaintiff's Act.

2. If plaintiff willfully stopped by drainage ditch used by defendant, thereby necessitating and producing injury to his own land, when waste water from defendant's irrigation operations escaped and flowed over it, plaintiff could not restrain defendant from permitting such escape. (Ward v. Seaweard, 273.)

Waters and Watercourses—Irrigation—De Facto Corporations—What Constitutes.

3. A ditch company, a *bona fide* attempt to organize which has been made under an existing law, which has actually used its corporate powers by appointing a secretary and filing notices to initiate water rights, is a *de facto* corporation. (Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.)

Waters and Watercourses — Irrigation Company — Acts of Officers—Ratification.

4. Where a *de facto* ditch company followed a notice to initiate a water right given by its secretary, by construction of an irrigation system and user of water therein, the act of the secretary was ratified, even if merely that of a promoter. (Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.)

Waters and Watercourses—"General Corporation"—Ditch Companies.

5. A mutual ditch company, not organized for the purpose of selling water or as a profit corporation but for the sole purpose of transmitting and delivering to appropriators and owners of the water the quantity to which each is entitled, is not a "general corporation," within the meaning of Section 6525, L. O. L. (Eldredge v. Mill Ditch Co., 590.)

WILLS.

Wills—Contract to Devise Land—Construction.

1. A contract to devise land to plaintiff, plaintiff and family to move upon land and board and lodge him, implied a condition that home given would be fairly decent and comfortable, that the food would be suitable, and treatment accorded him kind and respectful. (Hodgson v. Curtin, 105.)

Wills—Construction as a Whole.

2. A will must be construed as a whole, with effort to harmonize, if possible, the several clauses. (Beakey v. Knutson, 574.)

Wills—Construction—Intention of Testator.

3. Will must be construed to give effect to intention of testator. (Beakey v. Knutson, 574.)

Wills—Construction—Words—"Requests"—"Desire."

4. In construing words such as "desire" and "request" when used in will, testator's intention is controlling, and, where the desire or request must be complied with to effect testator's purpose, they are to be regarded as words of command or direction. (Beakey v. Knutson, 574.)

Wills—Construction—Words—"Direct"—"Require."

5. The word "direct," as used by testator, is mandatory in meaning, is substantially synonymous with "require," and means to point out with authority or direct as a superior, to order, to instruct, and to command. (Beakey v. Knutson, 574.)

Wills—Construction—Trusts—Education of Children.

6. Will giving all property to executrix, and in part reading, "I desire that my * * executrix shall sell such property as she shall deem proper, that she shall take care of, educate, maintain, and nourish our three children, * * for the purpose of so doing I direct and request that she use such or all of the money which may be the proceeds of any property she may sell as she may require for said purpose," *held* to create a trust for benefit of children. (Beakey v. Knutson, 574.)

Wills—Construction—"Dispose of."

7. Authority to "dispose of" testator's property gives no right to mortgage such property, a mortgage conveying no title and effecting no final disposition of property. (Beakey v. Knutson, 574.)

Wills—Bequest to Executor.

8. It is the rule rather than the exception that a bequest to an executor is deemed to be to him in his official capacity. (Beakey v. Knutson, 574.)

WITNESSES.

Witnesses—Diagrams of Brands—Use.

1. In a prosecution for larceny of a horse, diagrams resembling the brands on the horse were admissible to illustrate the testimony of the witnesses. (State v. Morris, 60.)

Witnesses—Diagrams of Brands—Relevancy.

2. That a horse alleged to have been stolen was exhibited to the jury in order to understand testimony given did not make irrelevant diagrams of brands on the horse used for the same purpose. (State v. Morris, 60.)

Witnesses—Evidence—Interest of Witness.

3. In a prosecution for larceny of a horse, evidence that defendant's witness traveled 100 miles without a subpoena to attend the grand jury investigation of the crime, and voluntarily appeared before that body, was admissible as showing the interest of the witness. (State v. Morris, 60.)

Witnesses—Cross-examination.

4. The court may on its own motion without objection from counsel exclude cross-examination intended only to humiliate the witness. (State v. Langford, 251.)

Witnesses—Credibility—Conduct of Witness.

5. In a prosecution for cattle theft, where defendant asserted an *alibi*, a witness testifying to seeing defendant under such circumstances as to corroborate that contention might be cross-questioned as to whether he did not testify at the preliminary examination of one also charged with the offense with whom he was on good terms, it

appearing that such witness, who did not testify at defendant's first trial and lived in the vicinity, did not inform defendant of the matter until subsequently etc. (State v. Stickel, 415.)

Witnesses—Impeachment—Prerequisites.

6. In prosecution for cruelty to a horse where a deputy who made the arrest had testified, accused was not entitled to show what he had made the deputy admit, certain things, without complying with Section 864, L. O. L., requiring the witness to be impeached to be asked whether he made the statement and be allowed to explain it. (State v. Goodall, 485.)

Witnesses—Impeachment—Conviction of Crime.

7. The court properly sustained an objection to a question on cross-examination of prosecuting witness as to whether he had been indicted charged with the crime of murder, under Section 863, L. O. L., relating to impeachment; it not being contended that witness was convicted of a crime. (State v. Bailey, 627.)

Witnesses—Cross-examination.

8. Where prosecuting witness, in a robbery case, undertook to relate all that he did, as well as all that defendant did, defendant having held the witness a prisoner for more than a day, defendant was entitled to conduct a searching and exhausting cross-examination, concerning not only the prominent features, but also the minute details of the story. (State v. Bailey, 627.)

Witnesses—Impeachment.

9. In view of Section 863, L. O. L., a witness could not be asked, "Now, from your experience with the boy during those six weeks that you were so closely associated with him, are you in a position to say whether or not the statements of that boy are reliable," to impeach the boy, who was nearly 15 years of age. (State v. Bailey, 627.)

Witness Employed to Obtain Evidence.

See Criminal Law, 15.

WORDS AND PHRASES.

"Accomplice"—See State v. Busick, 466.
"All"—See St. Helens Lumber Co. v. Evans, 71.

"Bailment"—See Miles v. Sabin, 129.

"Commerce"—See Guilliams v. Beaver Lake Club, 13.
"Common carriers"—See Eldredge v. Mill Ditch Co., 590.
"Conditonal sales"—See Miller v. Sabin, 129.
"Consideration"—See Bryson v. Day, 619.
"Creditor"—See Hewitt v. Linn Haven Orchard Co., 1.

"*De facto* corporations"—See Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.
"*De jure* corporations"—See Alder Slope Ditch Co. v. Moonshine Ditch Co., 385.
"Desertion"—See Wilhelm v. Wilhelm, 435.
"Desire"—See Beakey v. Knutson, 574.
"Direct"—See Beakey v. Knutson, 574.

"Dispose of"—See Beakey v. Knutson, 574.
"Doing business within the state"—See Deardorf v. Idaho Nat. Harvester Co., 425.

"General corporation"—See Eldredge v. Mill Ditch. Co., 590.

"Just"—See State v. Langford, 251.
"Just or sufficient cause"—See State v. Langford, 251.

"Machinery"—See Malloy v. Marshall-Wells Hardware Co., 303.

"Navigable stream"—See Guilliams v. Beaver Lake Club, 13.
"Navigability"—See Guilliams v. Beaver Lake Club, 13.

"*Prima facie* case"—See Doherty v. Hazelwood Company, 475.
"Proviso"—See Olson v. Heisen, 176.
"Public service corporation"—See Eldredge v. Mill Ditch Co., 590.
"Purview"—See Olson v. Heison, 176.

"Real property or interest therein"—See Aya v. Morson, 647.
"Requests"—See Beakey v. Knutson, 574.
"Required"—See Beakey v. Knutson, 574.

"Stockholder"—See Hewitt v. Linnhaven Orchard Co., 1.

"Torturing and tormenting animals"—See State v. Goodall, 485.

WORK AND LABOR.

Attorney's Fee in Action for Wages Due.
See Master and Servant, 1.

WORKMEN'S COMPENSATION ACT.

See Master and Servant, 21.